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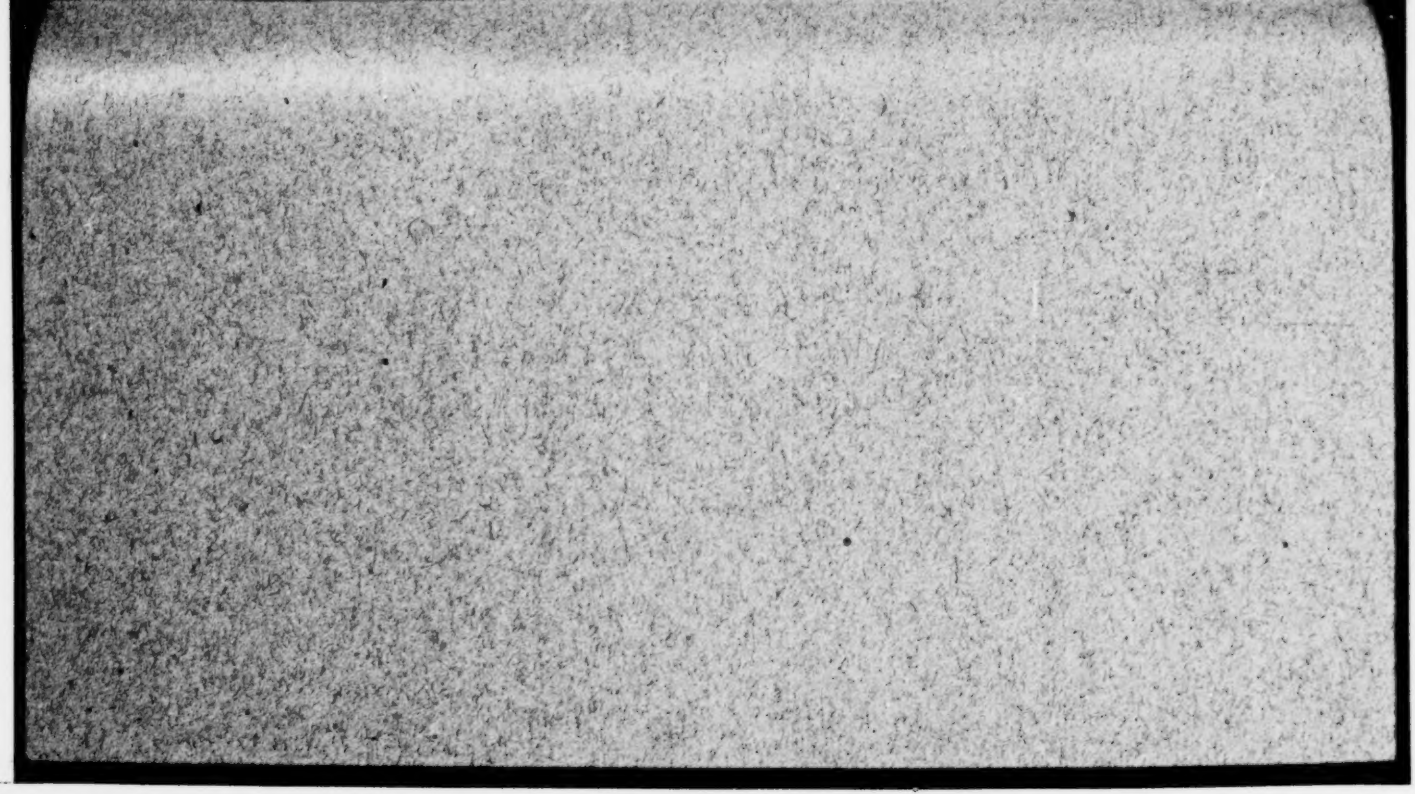
OCTOBER TERM, 1902.

UNITED STATES, APPELLANT, *v.* A. A. GREEN ET AL.	No. 109.
HARVEY L. CHRISTIE AND COLIN CAMERON *v.* UNITED STATES.	No. 129.

SAN RAFAEL DE LA ZANJA GRANT IN ARIZONA.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR THE UNITED STATES.



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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

UNITED STATES, APPELLANT, *v.* A. A. GREEN, R. R. RICHARDSON, COLIN Cameron, et al.	No. 109.
HARVEY L. CHRISTIE AND COLIN CAMERON, appellants, *v.* UNITED STATES.	No. 129.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT ON THE PLEADINGS.

On the 27th day of February, A. D. 1893, Alfred A. Green filed a petition for the confirmation of the San Rafael de la Zanja grant, situate in the county of Pima, Territory of Arizona, and alleged to have been made on the 15th day of May, A. D. 1825, and described as a tract having its center at a place called San Rafael; running thence northerly 200 cords, or 2 leagues, to an oak tree marked with a cross cut thereon and a stone monument at the tree; thence easterly 200

cords, or 2 leagues, to the northeasterly corner, marked by a heap of stones; thence southerly 400 cords, or 4 leagues; thence westerly 400 cords, or 4 leagues, to the southwesterly corner, being two little hills at the pass of San Antonio; thence northerly 400 cords, or 4 leagues, to a point on the Plumosa Mountain; thence easterly 200 cords, or 2 leagues, to the place of beginning. In his petition Green claims to have become invested with the legal title of the grant, and alleges that a petition for the confirmation of it was filed with the surveyor-general of Arizona pursuant to the act of July 22, 1854. This petition alleges the grant to be 16 square leagues in quantity and names a number of persons as claiming adversely to the petitioner, among them Colin Cameron, all of whom are made parties defendant to the petition (R., 1, 2).

On February 27, 1894, the United States filed its answer denying the allegations of the petition (R., 3).

On March 25, 1895, defendant, Colin Cameron, for the first time appeared in the cause, and thereupon filed a separate answer denying that plaintiff, Green, had any right, title, or interest in or to the grant for which he prays a confirmation, and averred that on the contrary he (Cameron) was the owner in fee, holder, and possessor of that tract of land, holding the same under and by virtue of a grant title dated May 15, 1825, made and executed by Juan Miguel Riesgo, commissary-general of the State of the West, in the name of the sovereign nation of the Mexican Republic. This answer further alleges that the purchase price of said grant was $1,297, 6 reals, and 5 grains,

for which amount the grant in question was on January 10, 1822, sold and conveyed in fee to one Ramon Romero and other citizens of the presidio of Santa Cruz.

That the proceedings resulting in the issuance of said title were instituted on July 19, 1821, addressed to Brigadier Antonio Cordero, governor intendants of Sonora and Sinaloa, the proper officer in charge of such matters, and that proceedings of survey, valuation, and publication were taken as required by the instructions and laws of the royal ordinances of intendants of December 4, 1786, which instructions and ordinances defendant avers were continued in force by the Mexican Republic without any change whatever in them; and that on January 10, 1822, the tract petitioned for and as surveyed according to the calls of the *expediente* thereof were sold by the officers of the Mexican Republic to Ramon Romero and other citizens of the presidio of Santa Cruz for the sum aforesaid, which amount, it is alleged, was thereupon, on January 11, 1822, paid by the said grantees into the national treasury of the Mexican Republic; that the said sale was on said last-named date approved by the provisional *junta* of the national treasury, and on the same day was referred to the supreme *junta* of royal hacienda for its approval; that before it could be approved the said supreme *junta* of royal hacienda was abolished, and no further proceedings were taken thereon until May 15, 1825, when Juan Miguel Riesgo, commissary-general of the State of the West, acting for and by authority of and in the name of the sovereign nation

of the Mexican Republic, issued to said grantees the final *testimonio* or evidence of title of said grant, and the same was thereupon duly recorded on folio 3 of book No. 2 of the records of grants or sales of lands for said year 1825.

That under the provisions of the act of Congress approved July 22, 1854, the successors in interest of said original grantees filed on February 28, 1880, in the office of the United States surveyor-general for the Territory of Arizona, their petition asking for the confirmation of said grant. Thereupon said surveyor-general caused said grant to be investigated by one R. C. Hopkins, a duly authorized and competent agent of the United States, and the said United States surveyor-general reported that the original title papers of said grant were genuine, and the latter recommended a confirmation of said grant to the legal representatives of the original grantees to the extent of four *sitios*, and no more, to be so located as to include the initial or center point of the original survey, but that no action was taken thereon by Congress or by any authorities of the United States, except as above stated; that the original grant documents were retained in the possession and custody of said United States surveyor-general, and that said grant is, and at the date of the execution of the treaty known as the Gadsden treaty was, located and duly recorded in the archives of Mexico; that the original grantees of said grant were Mexicans and citizens of the Republic of Mexico, and so were and continued to be at the time of the Gadsden

treaty, and that defendant Cameron owns, holds, and possesses said grant under and by virtue of divers and sundry mesne conveyances made by said original grantees and their grantees, said conveyances being on file in the office of the county recorder of Pima County, Ariz.; that the lands claimed by defendant are all the lands embraced within the original survey of said grant and the boundaries established and described therein and as indicated upon a certain map filed with defendant's answer as Exhibit A, said map being the Roskruge survey, appearing in the record as defendant's Exhibit F–52, at page 427.

Defendant further sets up that on September 6, 1886, the United States of America, one of the defendants herein, brought suit against him (Cameron) in the district court of the Territory of Arizona, under the act of Congress approved February 25, 1885, alleging that defendant had inclosed a large tract of public land belonging to the United States of America, subject to entry at the proper land office under the laws of the United States in such cases made and provided; that the lands so inclosed were in the first judicial district of the Territory of Arizona, the complaint alleging that defendant had inclosed as aforesaid 800 acres of public land without any title or claim or color of title acquired in good faith thereto, and without having first made application to acquire title thereto, or to any part thereof, according to law; that in that proceeding defendant Cameron answered and set up his title under said grant of May 15, 1825, made to said Ramon

Romero and others, and known and described as the Rancho San Rafael de la Zanja, with boundaries as set forth in said grant and as delineated in said Exhibit F-52; and defendant further alleged in his said answer in said case that he was the owner of said land grant, and that the inclosure referred to in the complaint therein was within the original boundaries of said grant as the same was surveyed by the Mexican authorities.

Defendant further alleges that said cause was thereupon tried by the court, sitting without a jury, and evidence was therein introduced as to the ownership by this defendant of said grant and of the location of said inclosure, and of the location of each monument described in the *testimonio* of said grant, and findings of facts were thereupon made in said cause, and it was in said cause found and adjudged that this defendant had succeeded to all of the right, title, and interest which Ramon Romero ever had in or to said grant, and had all such right, title, and interest of said Romero in said grant; and it was furthermore found and adjudged in said cause that the fence maintained by said defendant, Cameron, was within the exterior boundaries of said grant, as said boundaries were recited as measured in the *expediente*, or title paper of said grant, being a mile and a quarter south of the northern boundary, and 4 miles west of the east boundary of land recited as measured in said title; and it was further found and adjudged in said cause that the map attached as Exhibit A (being Exhibit F–52 in the present record) is a correct representation of the land included within the boundaries described in the original title

paper of said grant, and that said map correctly represents the location of each monument called for and described in said title paper.

Defendant Cameron by his said answer pleads such findings of fact establishing the monuments and location of said San Rafael de la Zanja grant as *res judicata.*

Defendant Cameron, concluding his said answer, avers that he in no wise invokes the jurisdiction of the court, or submits himself to it voluntarily, and that he answers herein only because he has been made a party defendant (R., 8); and while alleging said grant to have been perfect and complete when the United States acquired sovereignty over such lands, and to be a complete definitive grant in fee by way of sale, he avers that he is in no wise bound by the act of Congress establishing the Court of Private Land Claims to apply to said court for a confirmation of said title, and that he is *unwilling to submit himself to the conditions, or any of them, imposed by the act establishing this court upon petitioners applying to said court for confirmation of their title, and that he does not by this answer, or in any other way, so apply.*

On February 4, A. D. 1899, said defendant Cameron filed an additional answer, which differs from that just set forth in that the same omits the above-mentioned plea of *res judicata*, and includes the following additional allegations (R., 11, 12):

> That said grant was not a grant by quantity, but was a sale by the metes and bounds and natural landmarks established by the said sur-

vey thereof made by the Spanish officials prior to the issuance of the same, and that it vested in the grantees a perfect and valid title in fee to the whole of said tract so surveyed.

Defendant further avers that prior to said treaty known as the Gadsden treaty no resurvey of said grant had ever been applied for or ordered by anyone, and that none of the grantees or their successors in interest had, prior to said treaty, any knowledge or notice that within the said monuments there was any excess of land over the area stated in said title papers; and defendant avers that the grantees under said grant were, under the laws of Mexico and the State of Sonora existing at the date of said treaty, and for a long time prior thereto had been, holders in good faith of any such excess or surplus, if any such there is, and entitled to occupy and retain the same as owners even after such overplus is shown, without other obligations than to pay for the excess according to the quality of the land and the price that governed when it was surveyed and appraised: and defendant further avers that if this honorable court should decide that said sale, as recited in said title papers, did not, as defendant avers it did, convey to the grantees therein all of the said tract of land to the monuments described in said title papers without further payment therefor, he is ready and willing and now offers to pay to the United States of America any amount that may be found to be due from him for such overplus, and also the costs for ascertaining the same, as soon as the amount of the same and the sum due is ascertained.

Wherefore defendant now tenders to the United States of America, and offers to deposit with the clerk of this honorable court, for the United States of America, the sum of $1,349 in gold coin of the United States of America, as payment for all such overplus of said lands in said grant, according to their quality and the price which governed when it was surveyed and appraised, and the further sum of $200 in like coin for the costs of ascertaining and determining the existence or nonexistence of such overplus, and prays that this court order the clerk of said court to accept said sum as such tender; and, as aforesaid, offers to pay said amount or any amount which may by this honorable court be adjudged to be due for any such overplus or surplus, and prays that upon said payment this honorable court decree that defendant is entitled to and is the owner of all of said tract of land as originally surveyed, including said overplus or surplus, and that by said decree he be secured in the ownership and possession of the whole of said tract; and defendant answering herein by reason of the fact that he has been made a party defendant, prays that the validity of his said title may be inquired into and decided, and that his title to all of said lands be declared valid, and that the said grant be adjudged to be, and always to have been, a complete and perfect and unconditional title in fee, and the defendant be adjudged to be the owner in fee thereof; and for such other and further relief as to the court may seem meet and proper in the premises.

On May 19, 1899 (R., 88), defendant Cameron filed a supplemental answer, setting up the plea of *res judicata*, above referred to.

On February 4, 1899, Harvey L. Christie (R., 13–17) filed his separate answer, setting forth precisely the same allegations contained in Cameron's separate answer above mentioned.

It will be noted from the pleadings above referred to that up to February 4, 1899, none of the parties to the record, except Green, had filed in the court any pleading asking affirmative relief or a confirmation of their grant, the original answer of Cameron, as above shown, expressly disclaiming any desire to invoke the jurisdiction of the court or to secure from it a confirmation of the title relied upon.

On March 10, 1893, Frank H. Hereford and J. B. W. Gardiner (R., 83), who were codefendants with the United States, filed their answer, denying the allegations of the cross-petitions of Cameron and Christie, setting up ownership of a certain mine known as the Empire mine, under patent of the United States bearing date February 17, 1877, and alleging continuous possession of said mine for over twenty years previous to filing of answer.

On March 10, 1899, F. L. Bartlett, another codefendant, filed a similar answer, setting up ownership of the Holland mine and adverse possession thereof for over twenty years. (R., 85.)

On May 12, 1899, V. H. Igo, one of the codefendants, filed his answer (R., 86), alleging that about the

year 1880 he took up as unsurveyed public land of the United States a ranch near a large spring known as the Carricito Spring, being the spring within and near the northeast corner of claimants' survey; and that he had expended thereon over $20,000 in improvements; and upon the basis of this he prays that his rights in and to said land may be adjudged to be superior to the rights of the grant claimants. He further alleges (R., 87) that if the grant is adjudged to be valid, he is the owner of an undivided one-half of the same by reason of having purchased the interest of two of the four heirs of one Ramon Romero, the only purchaser whose name is given in the grant proceedings.

On May 13, 1899, the heirs at law and children of John J. Sheehy and Katherine Sheehy, also codefendants, filed their answer (R., 87), alleging that in the year 1879 the said John and Katherine Sheehy made a location in what is known as the San Rafael Valley of a tract of land about 3 miles north of the international line, said settlement having been made on the premises in the belief that the same was unsurveyed public lands of the United States; that extensive improvements were and have been made thereon; that at the time of such settlement there was no one there occupying or claiming to occupy said place upon which they located or any other place, claiming to do so by virtue of the Mexican land claim San Rafael de la Zanja; that there were no boundaries of said grant designated upon the ground, no monuments in view, and nothing to indicate the location of any grant; that

in the latter part of the year 1883 the said John J. Sheehy, upon being informed that there was a pretended Mexican grant covering said land, purchased for a valuable consideration, from one Juan Salgado, the sole heir of Thaddeus Salgado, one of the original coparceners of the grant, all of his right and title therein, amounting to three-fortieths of the grant; and said defendants pray that if the grant be valid for any purpose or to any extent they be declared to be the owners of said undivided three-fortieths (R., 88).

TRIAL OF CAUSE, AND TENDER.

The cause came on for hearing before the court, upon the pleadings just outlined, on February 4, 1899. (R., 18.) There was no appearance for the plaintiff, A. A. Green, and the cause proceeded to trial on the cross complaints filed by Cameron and Christie, which were treated by the court as petitions for affirmative relief against the United States.

At said time (R., 18) there was tendered, in open court, on behalf of said defendants, Harvey L. Christie and Colin Cameron, the sum of $1,359 in American gold coin for the *demasias* included in the outboundaries of this grant, as claimed by said defendants, and also the further sum of $200 in American gold coin to defray the further expenses of the survey of such *demasias*, these tenders being made pursuant to the allegations of the answers of said Christie and said Cameron.

There was tendered in evidence on behalf of said two defendants a certified copy of the *expediente* of the San Rafael de la Zanja grant, as Exhibit F-1 (R., 18, 33). The translation of the *expediente* was apparently omitted from the record, and is accordingly attached as Appendix 1 to this brief.

There was also tendered in evidence on behalf of the same defendants, the original title to the San Rafael de la Zanja grant, dated May 15, 1825, which was marked Exhibit F 2 (R., 18, 46), a translation of which appears in the record at page 525.

This *titulo* shows the following as the original proceedings upon which this title is based:

On the 19th day of July, 1821, Don Manuel Bustillo, a resident of the presidio of Santa Cruz, applied to the intendant of the province of Sonora and Sinaloa, Antonio Cordero, at Arispe, for 4 sitios of land at a place to which he afterwards gave the name of San Rafael de la Zanja. Three of these sitios were to be north of and adjoining the lands of said presidio, and the other at the place called Cajoncito to the east.

The application was granted on the same day without prejudice to third parties, and the commandant of Santa Cruz was ordered to make the survey, appraisement, and publication of the land for thirty consecutive days in solicitation of bidders.

Capt. Simon Elias Gonzales, commandant of Santa Cruz, accepted the commission October 4, 1821, and ordered the survey to be commenced on the next day,

after summoning the party in interest and the owners of coterminous lands.

It is stated the owners of coterminous lands were summoned, assistant appointed, and the survey made on the 5th and 6th of October, 1821, after the land had been previously reconnoitered.

After a waxed and twisted hempen cord of 50 varas had been measured, the applicant (Bustillo) requested that, inasmuch as the place called Cajoncito was inside of the presidio lands, the one sitio he had asked for there be given to him in one tract with the other three, which request was granted.

From the center point located by the applicant, with the name of San Rafael, there were measured north 200 cords, terminating on a table-land (mesa), on the edge of a creek that runs toward the Peñasco, at the foot of an oak tree, on which a cross was cut and at the foot of which a pile of stones was put to mark the place for the monument.

From the same center 200 cords were measured south to the north center monument of the Presidio lands, at the mouth of the Potrero Canyon.

From the same center 200 cords were measured east, crossing the Potrero Canyon and terminating on a table-land contiguous to said canyon. A large pile of stone was put to mark the place for the monument.

From the same center 133 cords were measured west and 67 estimated in the same direction to the summit of a high hill (cerro) in the Plomosa range of mountains, which is almost southwest from a small hill

(cerrito) known as the Caloso. The summit was marked for a monument.

On the 6th of October, 1821, the side lines were measured, parallel, respectively, to the two lines just described. Beginning at the north center monument, at the tree with the cross, 200 cords were *estimated* east to the point of the Cobre Mountains, above the Carricillo spring, where the northeast corner monument was placed.

From the same point—tree with a cross—200 cords were *estimated* west to the foot of a red hill (cerro) visible through the opening between the Peñasco and the Sonoita mountains, and which serves as a monument, being the northwest corner.

From the northwest corner 400 cords were *estimated* south along the Plomosa Mountains to a point beyond the San Antonio Pass on two small hills (cerritos), the northwest corner of the Presidio lands and the southwest corner of these 4 sitios.

Thence east there were measured 200 cords to the north center monument of the Presidio lands, the south center of the grant.

Thence continuing east, 200 cords were measured to the northeast corner of the Presidio lands on the Jaralito, the southeast corner of the grant.

Thence north 400 cords were *estimated* to the northeast corner already described.

It is stated that the foregoing survey covered "*the 4 sitios registered by Don Manuel Bustillo*," who was cautioned to build monuments of stone and mortar.

Appraisers were appointed and the 4 sitios appraised as follows:

Three sitios, at $60, because they have permanent water	$180
One sitio, at $30, because it was dry	30
For the 4 sitios	210

Publication was then made for thirty consecutive days soliciting bidders. None appeared.

Affidavits of three persons were taken to show that Bustillos had sufficient stock to stock the four sitios.

The expediente was then forwarded to the intendant, who, on December 11, 1821, referred it to the attorney-general for his opinion.

The attorney-general submitted a written opinion December 20, 1821, approving the proceedings and recommending that the three usual public offers be made and the land sold to the highest bidder upon payment of the price and the usual fees.

The intendant approved the recommendation of the attorney-general and ordered the three public offers made.

The first offer was made January 8, 1822. Don Ramon Romero "appeared for himself, and in the name of the other residents of the Presidio of Santa Cruz," and bid $10 over the bid of Manuel Bustillo. Bids and counter bids were made until Ramon Romero bid $1,200. Offers were made on the 9th and 10th, but no higher bid was made and the "4 sitios of land comprising the place of San Rafael de la Zanja were sold to Don Ramon Romero and the other residents of Santa Cruz."

Romero was notified of the result, with which he expressed satisfaction, and asked that the grant be made.

On January 11, 1822, the intendant, Ignacio de Bustamante, approved all the proceedings and ordered Romero to be notified and to pay into the treasury the price of the land and the usual fees, and, as soon as that was done and a voucher for the payment was aggregated to the expediente, it be sent to the superior board of the treasury in Mexico for such action as it might see fit to take.

Romero made the payment, and a certificate was given him January 11, 1822, for $1,297, 6 reals, 5 grains, being $1,200 purchase price and certain costs, among them $70, 6 reals, 5 grains, for the half annate tax and *18 per cent thereof for its transmittal to Spain.*

At this point the proceedings were suspended and so remained until May 15, 1825, three years four months and four days after, when the recently created commissary-general, Juan Miguel Riesgo, issued a title to "Don Ramon Romero and the other residents in interest" for "the four sitios of land for breeding cattle, comprising the place called San Rafael de la Zanja," under article 81, ordinance of intendants, and the royal instructions of October 15, 1754, at Fuerte, the then capital of the united states of Sonora and Sinaloa.

There is an entry at the end of the title (by whom made does not appear) that *toma de razon* of this title was made at folio 3 of book No. 2 in the commissariat general.

At said hearing defendants, Cameron and Christie, introduced in evidence a number of deeds from parties

claiming an interest in the grant to Alfred A. Green, being Exhibits F–3 to F–10 (R., 52–64). These deeds, in connection with the oral evidence (R., 91) and other deeds subsequently introduced, being Exhibits F–11 to F-51, inclusive (R., 385–423), F–54 to F–57 (R., 431–440), F–75 to F–77 (R., 462–464), and F–80 (R., 466), show that any title acquired by Alfred A. Green had, prior to the filing of the petition by Green, become vested in other parties, among them Cameron and Christie; that Green at the date of the filing of the suit had no title, having, as just stated, alienated all that he had acquired, and finally that said Cameron and Christie on the trial of the case showed sufficient interest in the subject-matter of the suit to invoke the jurisdiction of the court.

At said hearing the testimony of Ignacio Bonillas was taken to the effect that he had examined the records in the office of the treasurer-general of the State of Sonora, at Hermosillo, Sonora, Mexico, and had found among those records an expediente purporting to be the expediente of the San Rafael de la Zanja grant. He further testified that it was his recollection that there was not in the office of the treasurer-general "book No. 2" of *toma de razon*, the book in which it is alleged *toma de razon* of the issuance of this title was made.

It being made to appear to the court that certain parties, properly defendants under the land court act, had not been made defendants by the petitioners, the case was adjourned from February 6, 1899, to May 16, 1899 (R., 20), when its hearing was resumed and

finally concluded on May 31, 1899, when the cause was submitted (R., 90).

Under stipulation between the parties, on February 9, 1899, the testimony of ANGEL ELIAS, a resident of Fronteras, Sonora, Mexico, was taken and used on the trial of the cause. Mr. Elias testified (R., 20) that he was 60 years of age, and had been a soldier under the Government of Mexico as early as 1850, having been in 1853, at the apparent age of 14 years, commander of a company at Santa Cruz, and corporal of the *esquadra* in the army in 1850, at the age of 11 years (R., 21). He testified that during the time from 1850 to 1854 he was continually passing over the country between Tucson and Santa Cruz in the performance of his military duties, which was principally the pursuit of the Apache Indians, and during such service had occasion to pass through Sonoita, Babocomori, and San Pedro, and also the San Rafael de la Zanja country all of which are *loci* of grants now or heretofore pending before this court; that said places were uninhabited during that time on account of the Indians, there being only a few cattle and horses upon them, and that the place of San Rafael de la Zanja (R., 23) was abandoned on account of the war with the Indians, it not being possible to live there: that at that time there were some four hundred or five hundred people living at Santa Cruz, which is at present a populous village some 10 or 12 miles south of the grant here in controversy: that at that time there were signs of occupation of the San Rafael de la Zanja grant, temporary farms, small corrals and houses, both in good

condition and in ruins (R., 24); and that in the very vicinity of these houses, in 1854 or 1855, some of the settlers were killed.

Mr. Elias, on the subject of boundaries of the San Rafael de la Zanja grant, testified as follows (R., 29):

> Q. Did anybody ever point out to you what was called the north-center monument of the Pueblo of Santa Cruz?
>
> A. No; I only knew how far the land of the people of Santa Cruz extended according to the statements of the old people.
>
> Q. Where did they say it extended to?
>
> A. *Up to the place called Puerto del Canelo.*
>
> Q. Did you know the San Rafael de la Zanja grant in those days?
>
> A. Yes, sir; ever since I came to this frontier I knew it from the old people and from the neighbors.
>
> Q. Where was that from Santa Cruz?
>
> A. From the Santa Cruz it was *toward the upper part where the water—head streams—coming to Santa Cruz are.*
>
> Q. Who owned that grant?
>
> A. As I have said before, I understood that the owner of all that tract was all of the inhabitants of Santa Cruz; they bought their title.
>
> * * * * *
>
> Q. Where did they tell you the boundaries of the San Rafael de la Zanja were, if at all?
>
> A. They told me *the boundary line was at the Puerto del Canelo, sloping toward the Babacomori,* but except this they did not tell me where they were.

The relevancy of this testimony as bearing on the north boundary of this grant will become more apparent hereinafter.

Concepcion Elias, sworn on behalf of plaintiffs, testified that he lived at Santa Cruz, and was 60 years old; that he knew the children of Ramon Romero, the party who acted for the coparceners of Santa Cruz for the property now in controversy and the only one of said coparceners named in the title, and that he had three sons, Pedro, Francisco, and Encente (apparently Inocencio), and two daughters, Dolores and Juana, but that witness was not related to the family.

The evident purpose of this testimony was to show connection between the grantors in the deeds to Mr. Green and the family of Ramon Romero.

Elias also testified to the fact that Juan José Maria Montoya, Juan Alejandro Apodaca, Juan Jesus Dominguez, and Javier Dominguez, all of whom testified before the surveyor-general in behalf of claimants, were dead, thus paving the way for the introduction of their testimony under section five of the act establishing the Court of Private Land Claims.

Will M. Tipton, special agent of the Department of Justice, being sworn on behalf of plaintiffs (R., 91), testified that he had made an examination of the archives and records in the office of the treasurer-general in State of Sonora, at Hermosillo, and that he had found there only two books of *toma de razon*, one of them a very small book, not over a dozen leaves in it, and dated about 1824 or 1825, and the other a much

larger book that covered a long period of years, beginning some time in the thirtys and running up into the fortys (R., 92). Further describing said books (R., 233), he testified that the first of these did not exceed 6 or 7 inches in length, perhaps even less, and less than that in width, and consisted of twelve leaves at the time he first saw it (which was two or three years before the trial of the cause), five of which contained writing and five of which were blank. On the first page of the first leaf was the number 1 on it, and some title designating its contents or the purpose for which it was intended. The second book contained nearly 90 pages, with entries running from 1831 to 1849, said book having no indorsement or number on it; that there was no book in the archives containing an indorsement showing it to be book No. 2; that the last entry in book No. 1 is dated May 13, 1825, with a number of blank leaves following this entry, and that the first entry in the larger book was October 24, 1831, and that upon an examination of the contents of these two books no *toma de razon* of the *titulo* of the San Rafael de la Zanja was to be found, but that in the archives the original matrix or *expediente* of the San Rafael de la Zanja grant was found (R., 234).

Ignacio Bonillas (R., 92), called for plaintiffs, testified on the same subject: that he found two books of *toma de razon* in the archives, one of them marked on the outside of the cover with a figure 1, and the other being a large book with a sheepskin cover, and that witness did not remember anything about the indorsement thereon.

Further testifying (R., 95), Mr. Bonillas stated that he was 41 years of age, a native of the State of Sonora, and educated in both English and Spanish, having taken a course in mining engineering, mining and surveying at the Massachusetts Institute of Technology in Boston; that he had been engaged in mining for fifteen years, both in Sonora and Arizona, and had had considerable experience in translating Spanish documents, this experience dating back as far as the year 1875, being accompanied by the teaching of Spanish to English-speaking people; that he had held a number of offices in the Republic of Mexico requiring familiarity with the laws of that country and of the State of Sonora; and that he had been engaged in surveying land grants in that State almost constantly for fifteen years, having surveyed nearly 100 grants in Sonora and about 7 in Arizona (R., 96).

Testifying to these primitive surveys, Mr. Bonillas stated that the discrepancy existing within his observation between the course named in the title papers and that actually found on the ground varied from a few minutes to 60 or 70 degrees; and as to distances he had found them almost invariably much greater than those called for in the title papers; that in the location of perhaps a thousand monuments and natural objects under title papers he did not recollect a single instance where the courses and distance given in the document would bring him to the monument he was looking for, and that with two exceptions he found the area much in excess of that called for by the title papers. He cited

as an instance of this excess (R, 96) the Alamo de Seville, where the area called for in the title papers was 4 *sitios*, and the surveyor ran 200 cords, or 2 leagues, to each cardinal point, and in which there was found an area of 23½ *sitios*, thus making the total area of said grant 102,355 acres, of which, deducting the legal area of 17,354 acres, was left an excess of 85,001 acres, and for which title to the full extent of the *demasias* had been issued by the Mexican Government.

It is to be noted that this extreme case of an excess of 85,001 acres cited by Mr. Bonillas falls very far short of the excess named in the case at bar, where his survey includes over 140,000 acres above the four *sitios* named in the title papers.

Mr. Bonillas also produced before the court, as a part of his testimony, Exhibit F–60 (R., 444), being a list of grants in Mexico in which the discrepancy between the legal area and the total area is most striking. An examination of this list, which consists of sixteen grants, will show that in none of them was there any such excess as claimants attempt to secure in this case under the survey made by Mr. Bonillas.

Coming to the survey made by Mr. Bonillas himself of the San Rafael de la Zanja grant, he testified that he made this survey in the year 1895, carrying with him to the ground a certified Spanish copy of the *titulo*, and that based upon said survey he had made a map of the grant correct in every respect and which was offered in evidence as plaintiffs' Exhibit F–25 (R., 98, 412).

That in making this survey he first made a reconnoissance for the purpose of defining the monuments and natural landmarks, and then completed the survey by triangulation, that being in his opinion the most accurate method of surveying; that in making this survey he tried to follow the steps of the original officials by going to the initial point of the survey, and from the description given he would ascertain the location of the monuments or natural objects without regard to the courses and distances named in the title papers, and that he had acquired this habit of disregarding courses and distances because he had never found them to be in accord with the natural landmarks called for, and if he attempted to comply with the expediente in this respect he lost both time and patience.

That on this survey he had two guides with him, being parties from Santa Cruz, claiming to be perfectly familiar with all the country around there; these two parties being Concepcion Elias, a witness whose testimony will be hereinafter considered, and a man named Vergara, who, although still living (R. 98), was not produced on the trial; that he had them first show him the three monuments marking the north boundary of the Santa Cruz town lands, which he found to be identically as he had known them before, these monuments being also the south monuments of the grant in controversy (R. 99).

Reading from the expediente he stated that that document fixed the central point at a place named San

Rafael; that said place is a very well-known place in the valley, there being some ruins there and it being located on a level *mesa* on the east side of the Santa Cruz River and about a half mile south of the old ranch known as La Zanja and about 4 miles north of monument No. 111 on the international line; and that the place La Zanja means a ditch in the channel or bed of the valley. Going north from the center monument to the north center monument, as fixed by him, witness stated that he did not remember of a place between these two points that would answer the title call for the north center monument, and that although he looked for such a place he did not find it, except at the point which he adopted on his map as the north center of the grant. (R., 100.) Witness identified photograph F–26 (R., 100,412) as a picture of the center monument located by him, the starting point being the point where there is a pile of rocks and a man standing by it, said pile of rocks being 4 feet in diameter and 3 feet high (R., 121) and having the appearance of an old monument (R., 101). This photograph is worthy of close scrutiny by the court, in that it shows the topography of the country toward the northeast from said center point, the Huachuca Mountains constituting the range seen in the background of the picture (R., 134, 321), and the Canelo range constituting the lower line of mountains seen in the foreground of the picture (R., 133, 134, 321), and there being a depression about midway of the Huachuca Mountains called Tanner's Pass (R., 134). The record shows that

the Canelo hills shown in the photograph do not join the Huachuca Mountains, but end about 3 or 4 miles west of Tanner's Pass and a mile or two northwest of the Bonillas east center monument (R., 134) and that the Potrero Gulch (canyon) heads between the south end of the Canelo Hills and Tanner's Pass. The record further shows that the east center monument of the grant, as adopted by Bonillas, is a little southwest of Tanner's Pass, this latter also being called Sycamore Pass and being N. 56′ 26″ E. from the center. This reference to the record in connection with the said photograph will prove useful in the further consideration of the case.

Plaintiffs' Exhibit F–40 (R., 412) is another photographic representation of the center monument, but looking west, the Plomosa or Patagonia mountains appearing in the distance and witness Concepcion Elias in the foreground (R., 113).

Coming to the north center monument (R., 101), witness states that he found it at a very large oak tree, with some scars on the trunk and a pile of stones around it, this tree being on the border of a wash or arroyo which seems to run directly toward the place known as El Peñasco; said tree being apparently 2 or 3 feet in diameter and very old, and said monument also being apparently of great age. Witness testified that the word *peñasco*, as understood by him, means a large rock, whether isolated or otherwise and in place or not, and that this *peñasco* seemed to be very well known by everybody, including the guide Elias, by

that name. That it is not so known generally in that community will appear from the testimony of twelve or fifteen persons sworn on behalf of the Government, whose evidence will be presently considered.

Witness stated (R., 102) that standing at this tree one can not see this *peñasco*, but by leaving it a few steps and going in the direction of the arroyo it can be seen, and that from that point the cragged rocks composing the *peñasco* stand out as a landmark of great prominence in that section and can be observed for 10 miles away. Witness thereupon identified a number of photographs showing this center monument and the alleged *peñasco*. Photograph F–27 (R., 412) shows the pile of stones and the tree situate on the north bank of an arroyo (R., 162), the *peñasco* being southwest therefrom (R., 163). Photograph F–28 (R., 412) represents the *peñasco* looking toward the east (R., 164). Photograph F–29 (R., 412) shows the *peñasco* taken from the east (R., 103). Photograph F–30 (R., 412) shows the *peñasco* taken from the south at a distance of three-quarters of a mile or 1 mile, with the Red Rock Creek, along which the wagon road runs from San Rafael to Crittenden, appearing in the foreground (R., 103). Photograph F–31 (R., 412) represents the *peñasco* from the west, from the summit of the red hill near the foot of the red mountain, taken by Bonillas as his northwest corner (R., 105), the Cottonwood Wells being a half or three-quarters of a mile northeast of this hill at the foot of the red mountain (R., 106). Photograph F–32 (R.,

412) represents the oak tree, the Bonillas' north center of the grant, showing the border of the arroyo running toward the *peñasco*, with the red mountain, the alleged northwest corner, in the open space in the distance (R., 106). This photograph is taken from the east of the north center, looking west—perhaps a little southwest (R., 106)—the red mountain or Bonillas' northwest corner being the most distant and the Sonoita hills not being visible (R., 176) and lying west of the red mountain (R., 106), and the *peñasco* likewise being invisible from this point (R., 176). The particular tree constituting the north center is that under which the man is sitting who, in each of these photographs, is the Mexican Concepcion Elias. Photograph F–33 (R., 412) represents the *peñasco* as located by Bonillas, looking from the west toward the east, and is taken from the foot of the red mountain constituting the Bonillas' northwest corner (R., 107). The *peñasco* claimed is the high rock on the right of the picture. Photograph F–34 (R., 412) represents the bottom of the arroyo which runs toward the *peñasco* from the foot of the oak tree that is described by Bonillas as the north center monument of the grant (R., 108), the north center not being visible in this picture (R., 133), the *peñasco* likewise not being visible (R., 374). It is uncertain from the record just what the direction is from which this photograph was taken. Bonillas testified (R., 108) that it is taken looking from the direction of the *peñasco*, whereas Colin Cameron testified (R., 163) that it is a picture of the arroyo looking toward the southwest.

Bonillas testified that there was not to his knowledge any other *peñasco* between the north center as located by him and the red mountain; although he admitted that there was another mountain called Saddle Mountain, which has an abrupt bluff on the south side thereof, but which does not appear to be a *peñasco* from the point he took as the north center of the grant, although from some directions (R., 108) the north side has the appearance of a *peñasco*.

The relevancy of this testimony as to Saddle Mountain will appear when the testimony for the Government is considered, showing by its great preponderance that this alleged Saddle Mountain has been known from the earliest times as the *peñasco*.

Referring further to the northwest corner, witness Bonillas testified (R., 104) that it is a very singular fact that just about where the north center monument is you can observe through an opening formed by a canyon of this very wash of which the title papers speak, running toward the west, a high chain of limestone hills to the right or toward the north, looking from the north center monument to the west and ending abruptly into this canyon, and also the hills coming down from the same canyon from the south, there being an opening through which can be seen this red mountain in the distance, and that looking from the north center monument this red mountain seems to be in an open place beyond these hills or ridge. This red mountain, witness thinks, is the only red mountain which can be seen, it being at the end of the Plomosa range of mountains, also known as the Patagonia range

of mountains, and being the highest mountain in the neighborhood and having a red appearance due to the presence of red oxide of iron. Witness testified that this red mountain can be seen from all four cardinal points of the compass, although he is not certain that it can be seen from the center of the San Rafael de la Zanja grant as located by him (R., 105); that while there are other mountains out in that direction having a reddish appearance, they are not as large or conspicuous as this one. Further describing this northwest corner (R., 223), witness dwells upon the use of the word *descubre* as meaning discover, and that this term is impressive as applied to this red mountain for the reason that it can be seen in the distance only through a small opening apparently not more than 100 yards in width and having nothing at the end of the funnel except the red mountain and the edge of some hills, and that the Saddle Mountain can not be seen from the north center, nor can the Peñasco, although the latter may be seen by moving a little toward the north.

From the description given by Mr. Bonillas, and just referred to, it will be seen that while the red mountain or alleged northwest corner of the grant can be seen from the north center, the Sonoita Hills can not be seen, nor can the peñasco selected by Bonillas be seen; nor can the peñasco testified to by the Government witnesses be seen, so that Mr. Bonillas's wonderful discovery of a red hill seen from the north center monument through an opening between the peñasco and

the Sonoita Mountain, as described in the title papers, lacks every essential element except the existence of the hill itself, since the opening through which it is seen is not between these natural objects, they being under the testimony for claimants confessedly invisible from this north center.

Coming to the northeast corner of the Bonillas survey, witness testified, reading from the expediente, that this monument was originally placed at a point 200 cords, or 2 leagues, from the center monument at the point of the Sierra del Cobre, copper mountain, upon or beyond a spring known as El Carrisillo (R., 109). Witness testified that the guide he had with him informed him that a spur of the Huachuca Mountain was known as the Cerro del Cobre, and that he inquired of several old residents of Santa Cruz, familiar with that country, and that they told him it was so called. Witness identified Plaintiffs' Exhibit F-35 (R., 412) as showing the Sierra del Cobre, that mountain being indicated by the highest part of the elevation shown in the photograph, and the northeast corner being at the white flag indistinctly appearing in the picture about midway between the center and the left-hand side of the picture (R., 109), and that while the point of the copper mountain can be seen from the center monument of the San Rafael grant, the particular point taken as the northeast corner can not be seen because there is intervening the Canelo range of high hills. Witness testified that he found a spring in this neighborhood known locally as Igo spring and called by the

residents of Santa Cruz, el Carricillo or Carricito. This spring has an abundant flow of water bubbling at the foot of the mountains at the north end of this Huachuca Mountain, or Sierra del Cobre, and an attempt has been made there to gather the water. This is illustrated in Plaintiffs' Exhibit F-36, in which the Mustang or Whetstone Mountains appear in the distance, the spring near the house on the right-hand side of the picture, the northeast corner monument about three-fourths of a mile beyond the spring (R., 111), and the Babocomori Valley intervening between the spring and the mountains in the distance (R., 133). Witness described the monument as being formed of disintegrated rocks, copper stained, situated at the foot of the mountains, having the appearance of an old monument that had been rebuilt. Plaintiffs' Exhibit F-37 (R., 412) was identified by witness as the northeast monument just referred to.

Coming to the south center monument, described in the title papers as being at the mouth of the Potrero Canyon, where that canyon enters the valley, and being the same point where the north center of the lands of the presidio of Santa Cruz is situated, witness testified (R., 112) that this canyon or *cañada* is a very well-known gulch or valley flowing from northeast to southwest and entering the main valley of the Santa Cruz River, and that at its mouth, upon a rising elevation, a pile of stones constituting the south center monument is found. Witness testified that this monument had been pointed out to him on different occasions by

old inhabitants of Santa Cruz as the monument that marked the north boundary of the town lands, and that it is apparently an old one at the base, subsequently built up by rocks placed on the top. Witness identified plaintiffs' Exhibit F–38 (R., 412) as a photograph of the south center monument looking toward the northwest, with the Patagonia Mountains in the distance, and what seems to be the red mountain, previously testified to as the northwest corner of the grant, appearing at the north end of said mountain (R., 112). After identifying photograph F–39 (R., 412), witness testified that this correctly represents the south center monument looking toward the northeast, with the Huachuca and El Cobre mountains in the distance, the latter appearing toward the north point of the range (R., 113).

Coming now to the southwest corner, which is described in the title papers as being "on the Jaralito at the corner monument of the lands of the aforesaid pueblo," witness testified (R., 113) that "Jaralito" means a grove of water willows, and that he found such a place, it being a well known little valley with a little stream running through it called Jaralito and with water willows very abundant. At this place witness found a monument, of which he had known before, standing at the slope of the mesa and having every appearance of age. This monument, witness testified (R., 114), had been pointed out to him as the northeast corner of the presidio lands of Santa Cruz.

The east center monument is established by the

expediente beyond Potrero Canyon on a mesa contiguous thereto. Witness testified that going toward the east from the center monument, already identified by him, a mesa and the Potrero Gulch are crossed, after which a very high mesa at the foot of the hills of the Huachuca is reached, on which is a large pile of rocks, bearing "unmistakable signs of age," and which witness selected as the east center monument of the grant. Witness identified plaintiff's Exhibit F–41 (R., 412) as correctly representing this east center monument, the mountains in the background being the Huachuca Mountains.

Referring to the west center monument, which the title papers place at the summit of a high hill in the Plomosa range of mountains, almost southwest from the small hill known as El Caloso, witness testified that El Caloso means "lime hill," and that there is such a hill in that section of country, very well known, and being the only point that could be taken for a lime hill. Plaintiff's Exhibit F–43 (R., 412) was identified by the witness as a representation of the El Caloso hill, which witness stated was visible from the center, east center, south center, and southwest corner, and anywhere along the valley (R., 115).

Witness, after referring to the title papers which fix the southwest corner at "a point beyond the San Antonio Pass on two small hills which serve as the west corner of the lands of this presidio" (Santa Cruz), stated that he found the San Antonio Pass, and that it lies to the northwest of the town of Santa Cruz, being very

well known as the pass through which runs a trail from Santa Cruz to Tucson. Witness testified that he had known this monument as far back as 1885 or 1886 in surveying the Santa Barbara grant, in the State of Sonora, the northwest corner of which is on this same little hill, not over 80 feet from the monument of the town lands of Santa Cruz, which is the southwest corner of the San Rafael de la Zanja grant, and that these two little hills are very noticeable both from east and west, and can be seen from the south-center monument. Witness identified plaintiff's Exhibit F 44 (R., 412) as representing these two small hills south of the San Antonio Pass, constituting the southwest corner (R., 116), and that the monument at this point had been pointed out to him by the people of Lochiel (La Noria) and the authorities of Santa Cruz at the time he made the official survey of the Santa Barbara grant (R., 117), and that this monument, while built up, was the same monument. On cross-examination witness testified that he had been in the employ of grant claimants in Arizona, and in his work in the State of Sonora he acted under official appointments to survey public lands and also land grants, the latter for the purpose of ascertaining the *demasias* or excess within their boundaries, so as to ascertain the quantity that the owners of the grant had to pay for (R., 119); and the procedure was by petition to the Government by the owners of the land, or the people who desired to acquire the excess that might be found inside of the boundaries, and that thereupon a surveyor was appointed

seeking not to carry out the theory of the claimants, but to do his best for the Government (R., 119, 120), and that in making such surveys of grants in Mexico the monuments were usually determined without reference to the course and distance.

The method of ascertaining the excess within outboundaries over the quantity paid for is more fully pointed out in the testimony of Bonillas given in the case of *Faxon* v. *United States* (171 U. S., 244), and which is reproduced in the record, pages 534, 535.

Witness testified that on his survey of this grant he started from the ranch of Mr. Colin Cameron, the latter not being there, however, during the survey, and that the survey consumed twenty to twenty-five days; that as to the ruins at the center monument there seemed to be an accumulation of soil, without any of the adobe bricks being visible, and that there were ruins of adobe houses about a mile and a half north of the international boundary line, and on the west side of the river, which ruins were called by the guides who accompanied witness New San Rafael, these guides claiming that they knew when these houses were built there, having been built during the French invasion in the early sixties. It will be seen from the testimony of the Government to be presently considered, that the Old Place of San Rafael, and not the New Place, was located at these ruins, a mile and a half north of the international line.

Witness testified that the time when he made his survey, which was in September, 1895, was the rainy

season, and there was water everywhere, and that he did not examine the country approximately two hundred cords north of his center monument with a view to finding the north center (R., 123); that the Sierra del Cobre is a spur from the Huachuca Mountains and runs all along the west side of the Huachuca Mountains to a low pass that is about the center of those mountains (R., 124), the name of this pass being Tanner's Pass (R., 124), as heretofore noted in connection with the photograph marked Exhibit F–26, and that the Cobre Mountains extend from this place of Tanner's Pass to the north end of the Huachucas. It will be noted that this places one point of the so-called Sierra del Cobre at Igo's and the other point at Tanner's Pass, which is in the immediate vicinity of the southeast end of the Canelo Hills, and in the vicinity of Campini's copper property, to be hereinafter considered.

Witness testified that there were signs of copper-stained rocks at the north end of the Huachuca Mountains, and that the monument of stone situated there, while apparently an old one, had been moved and built up (R., 124); that the reed known as *carricillo* grows in wet places, and as the witness recalled, such *carricillo* was found at the Igo Spring.

Witness testified that in locating the north center monument his guides took him right to the point which he adopted, and that he did not stop anywhere to search for it nor to look for any other north center. (R., 126.) It may be here noted that Concepcion Elias, the Mexican witness and the only one of those guides

produced on the trial and whose photograph appears in a number of the exhibits presented by plaintiff, had previously been on a survey with Roskruge and Cameron, and was thus fully prepared to guide Bonillas to the point which accorded with Roskruge's survey on the one hand and was satisfactory to Claimant Cameron on the other.

Witness described the Canelo Hills, which bisect this grant as surveyed by Bonillas, running from his east center monument to his north center monument, as being a divide or watershed and composed of very high hills, equal in height to Saddle Mountain and the peñasco heretofore considered. The improbability that the Mexican Government would have made a grant, or the original claimant have asked for a grant having topographical features cutting that tract in half and making a portion of it practically inaccessible from the other portion will be presently considered as bearing upon the proper location of its north boundary.

Referring further to the Saddle Mountain and the peñasco, Bonillas (R., 127) stated that the latter was probably higher than the first, but that Saddle Mountain was nearer to the valley and in plain view as one rides up the valley, and that the Plomosa or Patagonia Mountains, which are well known, are in full view looking toward the west from the center of the grant. Witness testified as to Saddle Mountain being a very abrupt elevation on the south and west, being called Saddle Mountain by the Americans, and Picacho by the Mexicans, but not being in the opinion of witness

a picacho (R., 375), a *picacho* being a mountain with an acute point and a *peñasco* a big rock (R., 128).

Witness testified that he found no artificial monuments at the northwest corner of the grant, or the west center of the grant (R., 128, 129); that the east center as located by him is nearly 9 miles northeast from the center, and that in the vicinity of this east center and beyond the Cañada del Protero "there are mesas all over there," thus showing that there is absolutely nothing to fix this east center monument except one of the hundreds of piles of stones existing in that country.

Witness admitted (R., 129, 130) that while the northeast corner of the Santa Cruz lands was fixed by the title papers as the southeast corner of the San Rafael de la Zanja grant, his survey placed the southeast corner of the San Rafael de la Zanja grant 19,449 feet, or over 3 miles east of the northeast corner of the Santa Cruz grant, as surveyed by Quijano, and accepted by the Santa Cruz people, but he accounted for this fact on the ground that the Santa Cruz people had accepted Quijano's northeast corner in order to avoid a lawsuit, their true boundary being as fixed by Bonillas. Witness produced (R., 137) a sketch of the relative positions of these points as located by Quijano. This sketch appears as plaintiff's Exhibit F 46, being the last map in the record between pages 412 and 413. An examination of this map will show the discrepancy between Bonillas's southeast corner of the San Rafael de la Zanja grant, at point E, and the northeast corner of the town lands of Santa Cruz, 3 or more miles far-

ther west. Bonillas further attempted to account for this discrepancy (R., 138) by stating that in the survey of adjoining grants he had summoned the local authorities of Santa Cruz to point out their monuments, and they had pointed out to him, as their ancient northeast corner, the point adopted by him as the southeast corner of the San Rafael de la Zanja grant. It is to be noted, however, that in the face of the existence of this supposed ancient monument they were willing to accept Mr. Quijano's survey limiting them to a point several miles farther west.

Referring to the northwest corner, or Red Hill, as viewed from the north center monument, and which has been heretofore considered in connection with plaintiff's Exhibit F 32, a photograph, witness testified that the Sonoita Hills, mentioned in the title papers, are west of the river, running on the west side thereof, and that these hills are *not* visible from the north center, being cut off by high ranges and the red mountain, and being back of the red mountain to anyone standing at the north center or anywhere east of that red mountain (R., 131). It is to be observed that it would require one of even more ingenuity than Mr. Bonillas discloses to explain how there can be seen from the north center a red hill in the opening between the Peñasco and the Sonoita Mountains, when the latter is not visible at all from the north center, and is in fact from that point *hidden behind* the red mountain, the very natural object, which is stated in the *expediente* to stand between it and a third natural object.

Witness, referring to the west center monument, testified that El Caloso Hill, which marks the location of that monument, is a high one, with Washington mining camp situated on its slope, and that the Patagonia Mountains, which run from north to south, has foothills all along its eastern side. It is here to be remarked that while Bonillas and the other witnesses for claimants all testified that El Caloso Hill is a prominent landmark and is a mountain of considerable dimensions, the title papers speak of it as "the small hill known as El Caloso" (R., 132, 528).

On redirect examination (R., 135) witness testified as to the crudeness of the ancient methods of taking courses and measuring distances in the survey of lands; that the ruins at the center of the grant as taken by him are much older than those at the point a mile and a half north of the international boundary line, and that these latter were houses occupied by Governor Piscarro when driven out of Mexico by the French invasion.

Witness testified that he had subsequent to making his survey of September, 1895, made a survey of the San Rafael de la Zanja grant, running 100 cords from the place taken as the center to the north, and that he did not remember finding at the end of such measurement any arroyo such as would answer the calls of the *expediente* from the north center monument, the water at that point not running toward the peñasco; and that similar measurements made south, east, and west failed to encounter objects that would answer the calls of the

expediente (R., 142). He further testified that he had made a reconnoissance of the country situated 200 cords north from the center, and he found no water and no arroyo running toward the peñasco or toward Saddle Mountain, and he found no natural objects answering the calls of the *expediente* (R., 143); that a similar reconnoissance eastward showed that running 200 cords from the center would not reach the Cañada del Potrero, but would terminate some distance west of it, and that he did not find at the end of such distance any point that would answer to the calls of the *expediente;* that a similar reconnoissance 200 cords to the west did not reach El Caloso, or encounter natural objects conforming to the *expediente;* but that a reconnoissance 200 cords south from the center brought one very close to the mouth of the Potrero Cañada (R., 143).

Coming to the quality of the land (R., 140-141), witness pointed out that the original sale of 4 *sitios* was on the basis of 3 *sitios* containing running water and the fourth as being capable of furnishing water by means of wells. Witness testified (R., 144) that measuring exactly 100 cords north, south, east, and west from the center monument, as taken by him, and thereupon platting the land thus measured in four quarters, so that there would be 1 *sitio* in each quarter, there would be permanent running water on only two of them, to wit, the northwest and the southeast quarters, or *sitios*, the other two being dry. Witness testified that a reconnoissance of the tract included

within a measurement in each direction of 200 cords from the center, as taken by him, showed that if such a square was divided into four equal quarters by lines running from the center to the side lines, there would be permanent running water on only two of such quarters (R., 144), and that if the total tract of land, as surveyed by him, were cut into four equal quarters by lines connecting the north center, east center, west center, and south center monuments with the center monument, as taken by him, there would be permanent running water in three of these quarters, but witness did not believe there would be any permanent running water in the southwest quarter (R., 144-145). Witness went on to testify as to where such permanent running water would be found in the several tracts; that in the northeast quarter there is water north of the Canelo hills, in the valleys running north, in the Coches Valley, and the Carricillo Spring; that in the northwest quarter there would be water near Harshaw, which is southwest of the Peñasco and Saddle Mountain, said water being about a half mile south of the latter and about a mile and a half east of the west boundary; there would also be water near Cottonwood Wells, and in the southeast quarter there would be running water in Potrero Gulch and at the Jaralito, but that he did not think there would be found any permanent running water in the southwest quarter of the grant, although in San Antonio Pass there is water in the rainy season and during the winter. Witness testified as to the existence in the southwest quarter, however, of the place

known as La Noria, which means "the well," and that there are several wells at said settlement. The purpose of this finely-spun theory as to a well in the southwest quarter is evidently to fix that quarter as being the one upon which a value of $30 was fixed originally on the ground that it could be watered only by means of wells. One of the many defects of such a theory, however, if one of this fanciful nature is to be seriously discussed, is the fact that the map made by Bonillas himself shows that the southwest quarter has water in it, a glance at his plat, plaintiff's Exhibit F 25, showing that the Santa Cruz River is largely west of a line connecting his center monument with his south center monument. The testimony of the Government's witnesses is abundant to the effect that in this southwest quarter there is a large amount of permanent running water.

Coming to the consideration of the survey made by Bonillas as compared with the survey made for claimants by Roskruge (the latter being in the record as Exhibit F 52, page 427, and having been made in the year 1887), Bonillas testified (R., 147) that he took the same northeast monument as Roskruge, and also the same north center, and yet the latter on the survey (R., 148) are confessedly a quarter of a mile apart. Being examined more in detail on the subject (R., 149), Bonillas shows that the difference between his course from the northeast corner to the north center and that taken by Roskruge is about 3 degrees and the difference in their distances is about a quarter of a mile; that the Bonillas course from the north center to the

northwest corner is south 65 degrees 27 minutes 42 seconds west, as against Roskruge's course of south 80 degrees 15 minutes west, and the difference in the distance measured by these two eminent surveyors, between what are presumably the same points, is over a mile and a half; that Roskruge's north center is south and east of that of Bonillas's and his northwest corner north and east of Bonillas's; that the difference in the distance from the northwest to the west center monuments on these two surveys is over a mile and a quarter and the difference in course from the west center to the southwest corner on the two surveys is over 3 degrees, and the difference in distance is about half a mile (R., 150); that Roskruge's southeast corner and Bonillas's southeast corner are a mile apart, the former's being about south 12 degrees 30 minutes west from Bonillas's corner; that Bonillas's east center is three-eighths of a mile from Roskruge's, and the discrepancy in the course from the east center to the northeast and southeast monuments is correspondingly noticeable.

It is entirely evident from the discrepancy in the measurements and courses just referred to that Bonillas and Roskruge, under the same employment and guided by the same omniscient Mexican, Concepcion Elias, selected in several instances entirely different objects as the boundaries of this grant. As disclosed by their testimony, each of these witnesses are entirely certain that their locations are correct, and that their surveys, in each instance made by triangulation (R., 149, 201),

are entirely accurate. This result, which reverses the old rule that things which are equal to the same thing are equal to each other, is only one of the many difficulties and absurdities resulting from attempting to make a grant of 4 *sitios*, or 16,000 acres, contain 40 *sitios*, or 160,000 acres.

Witness further testified that the ruins in the Santa Cruz Valley, about a mile and a half north of the international boundary line, to which he had already testified, are about 100 cords from the south center monument as located by him (R., 152), and that a *sitio* is a square of 5,000 varas, or 1 league (R., 155). He further testified that within the outboundaries he had mentioned there could be 6 or 8 *sitios* laid off with permanent water in them, and showed (R., 155), from the fact that springs in that country dry up and disappear—due to various causes—that there may have been permanent water at the date of the grant on the alleged dry *sitio* that is not to be found there now, and similarly that springs have been known to start out in that country afresh as a result of earthquakes (R., 157).

COLIN CAMERON, being called as a witness (R., 157), testified that he was the claimant of the San Rafael de la Zanja grant, having purchased it for himself and others in 1884 from R. R. Richardson, at an aggregate expense of over $80,000, with taxes imposed and collected by the officials of the county of Pima of over $25,000 since the year 1882 (R., 158); that at the time he purchased from Richardson the latter pointed out to

him some of the boundaries, among them the southwest corner at the same place identified by Bonillas, the south center monument, also at the same place mentioned by Bonillas, and the northeast monument as fixed by Bonillas; that at the last-named monument is located the Sierra del Cobre, being the north end of the Huachuca Mountains; that the spring at this point was pointed out by Richardson, who told witness that it was Carricillo spring; that Richardson did not point out the exact spot of the other monuments, but that witness and Richardson were together in the vicinity of the southeast monument, and Richardson then told witness that the northwest monument was at the red hill taken by Bonillas, but that he, Richardson, did not know exactly where it was (R., 159). Cameron further testified (R., 160) that he had been in the cattle business for a number of years, and that to furnish ideal conditions for cattle raising animals should not be required to go over 2 miles a day for water, and that they lose flesh as soon as they go over 3 (R., 160); that there is very little water near the center monument taken by Bonillas, but that up to 1890 there was a little spring in front of witness's house, although not sufficient water for cattle, but witness had developed it so that it was now capable of watering cattle. The house of witness is at the point marked on Bonillas's map (R., 25) as San Rafael ranch, and the spring thus referred to by him, is, therefore, in the alleged dry, or *well* quarter upon which Bonillas laid so much stress.

Mr. Cameron further testified that a square measured

on the basis of 100 cords toward the cardinal points, from the center taken by Bonillas, would contain permanent running water, but not sufficient to support more than 400 head of cattle without artificial means (R., 161); that viewing the grant as one of 16 square leagues, or 200 cords measured in each direction from Bonillas's center, cattle were obliged prior to 1890 to come down to the southern part of the grant, to wit, at Sheehy's spring, near the international boundary line, for the purpose of securing water (R., 162).

Witness expressed the opinion (R., 162) that the monuments of the grant were put in places where they would be placed by a man who was seeking that particular tract of country for a cattle ranch, being placed just where they would control the water. Witness did not make it entirely clear whether the monuments to which he refers were those placed by Bonillas, or by the original surveyor. If he refers to the Bonillas survey, the Government freely admits that the monuments on that survey were placed with the most scrupulous care so as to control not only the water in the Santa Cruz Valley, but a large portion of the water sources on the slopes draining into the Sonoita and Babocomari rivers, locations which, it is respectfully submitted on the title papers, were absolutely foreign to the purpose of the original purchaser of this tract of land, and are altogether the product of comparatively modern enterprise.

Mr. Cameron testified (R., 162) that he had been to the north center monument selected by Bonillas, and

had found there a monument under a large oak tree on the north bank of the arroyo running southwest to what Bonillas puts on his map as the peñasco: that the land north of the north center consists of some mesas sloping toward the Babocomori Valley, and the lands south of it are very rocky, broken and hilly; that the arroyo is south of the tree and the peñasco is south of west of the tree; that the red mountain claimed by Bonillas as the northwest corner can be seen from the north center monument, the arroyo running from said tree cutting the Canelo Hills in two and leaving an open space through which these red hills can be seen. Witness further testifies that this red hill stands in the open, but the Sonoita Hills looking from the north center are farther north and can not be seen because the red hill intervenes and the Canelo Mountains are in the way (R., 163.) In view of the fact that the red hill at the northwest corner is stated by the title papers to be visible through an opening between the peñasco and Senoita Mountains, the fact that the Senoita Mountains can not be seen from the north center and the true peñasco likewise can not be seen, throws considerable light upon the question as to whether or not this northwest corner and the north center monument are correctly located by Bonillas.

Witness testified (R., 164) that the true peñasco is at the place selected by Bonillas, and that Richardson pointed out this place to witness as the peñasco at the time he went around the grant with him and also showed him Saddle Mountain (R., **164**). Mr. Richard-

son flatly contradicts witness in his testimony, to be hereinafter considered, and under the circumstances of this case, as disclosed by the record, it is not difficult to decide which witness is to be believed. Witness further testified that he saw the pile of stones at the foot of the tree at the north center of the grant, and that looking toward the peñasco from the north center or vicinity no other red mountain is visible except the mountain taken as the northwest center. Witness testified that he had been to the northeast corner of the grant and found it to be at the north end of the Huachuca or Sierra del Cobre Mountain, and is marked by a pile of stones placed there as the monument of the grant, right along the public highway, and that said monument appeared to be old in 1883 as did the monument at the north center, the oak tree at that time being about 3 feet in diameter (R., 164. 165); that in the country intervening between the center monument and the northwest corner no other red hill answering the description of the *expediente* appears, and there is no spring from the center toward the northeast corner answering the title, except the spring at Igo's (R., 165).

Witness stated that the east center as located by Bonillas is found on the east bank of the Potrero Cañada and on the mesa above it; that the name Potrero is that generally applied to that cañada by the Santa Cruz people and others and has been so known ever since witness has been there, being also called Parker's Cañada, because the Parker family live there, and that there is no other monument answering the call

for the east center, going east from the center monument (R., 165, 166), the pile of stones locating the east center being about 6 inches or so in height and being apparently of great age.

Coming to the south center, Mr. Cameron describes it as being on the north edge of a small mesa right at the Cañada del Potrero, which point is marked by an old monument that has been there for years (R., 166). Witness further testified that he had been to the southwest corner, which is a short distance south of the trail going through San Antonio Pass from Santa Cruz to Nogales and about half way up the slope toward the summit of the mountain, at which point are to be seen two small hills. Similarly the west center monument is found on a very high rocky hill close to and southwest of El Caloso, which last is a high lime hill or peak with limstone top and is a very prominent landmark both from the northeast and the southeast (R., 166), and that there is no other lime hill in the Plomosa Mountains and no other place that will answer the call of the *expediente* in that direction. In view of the fact that the *expediente* describes this as a *small* hill, it would seem that Mr. Cameron's selection was unfortunate in differing from the expediente in a most important respect.

Coming back to the center monument (R., 167) Mr. Cameron testified that the point selected by Bonillas is the same point indicated to him by Richardson as the center monument in February, 1883, there being a pile of stones at that place, and in addition evidences

of streets between adobe ruins long since fallen down and covered with grass, and with marks of walls or corrals, and there being no other ruins within the Bonillas survey (R., 167).

On the subject of ruins about 100 cords south of the Bonillas center and which the Government witnesses describe as old San Rafael, Mr. Cameron describes it as a long house built for a number of families with two other houses there, one of them never completed; that at the time he, Cameron, went there there was no one living there, Richardson having bought out the man who had lived there, but they said Piscarro had lived there, having been driven out of Sonora in the sixties (R., 167, 168).

Witness further testified (R., 168) that the monuments are in the same locality as in 1883, the only change made in them being the fact that they have been built up to some extent.

Witness further testified (R., 168) that he did not know that the point selected by Bonillas was the southeast corner of the grant until after Bonillas had made his survey, and that he was not with him on his survey. He further testified that the rainy season in that country is from July to September, and again in November and December, with considerable snow (R., 169), and that it rains also in October (R., 174), and, referring to the topography of the country north of the Canelo range, he testified that cattle do not range northeast of the Canelo hills, that being a very rough section of country, and it being impossible to get cattle over there (R., 169).

This testimony is relevant as bearing on the question as to where the north limits of this grant were fixed by the original survey, it being extremely improbable that the original claimants in seeking a cattle range would have contemplated including in it a large section of country which, even now, when Indian hostilities have ceased, is inaccessible to cattle from the San Rafael Valley.

Cameron testified to the existence of permanent water in various parts of the grant, contending (R., 170) that the southwest quarter is mesa land with no permanent running water; but admitting that even here water can be secured at certain portions of the year, there being water at the San Rafael ranch house, the residence of witness.

Witness testified that there were a number of settlers on the grant when he bought it (R., 170); that he bought a dozen or more of them, and stopped doing so only because he believed that the people whom he had bought out got other men to "jump" the places in order to sell to witness again.

On recross-examination witness testified as to his interest not only in the grant on trial, but also in the Babocomori, Agua Prieta, Arivaca, Sonoita, and Boquillas land grants in Arizona, all of them pending before the Court of Private Land Claims at the date of the trial of this cause, and all of them involving questions of quantity, constituting one of the main issues in this case. Cameron testified that he had had this grant surveyed twice, once by Roskruge and

once by Bonillas; that he was with Roskruge at one of the points on his survey, and was shown afterwards by him the particular points he took (R., 172). He admits (R., 173) that Roskruge and Bonillas took monuments entirely different for the southeast corner.

Referring to the flow of water from the neighborhood of the Horse Corral shown on Roskruge map, Exhibit F–52 (R., 427), Mr. Cameron testified that the flow from Horse Corral is in the direction of Saddle Mountain, and indicating this direction on said map F–52 he describes this flow as follows (R., 174):

> Q. During the rainy season where is the flow in the Santa Cruz River—where does it flow from and to where, during the rainy season—from where to where?
>
> A. It starts right there at this point—this represents the mesa—marked "horse corral."
>
> Q. And flows down to where?
>
> A. It comes right close to this Saddle Mountain, and comes down this arroyo on down here.
>
> Q. Just indicate it.
>
> A. From the Saddle Mountain it comes here to this road, right down here, and then right down in there.
>
> Q. How far does it flow south?
>
> A. To Tucson.

Witness further testified on this subject as follows (R., 177):

> Q. I wish you would indicate on the map the course of that stream running southwest from the horse corral.
>
> A. This country up here north of the horse corral slopes in the first place in the direction

of the west—that line represents the slope of the red rock country—then goes down this way here to Saddle Mountain, and then turns this way and runs west.

Q. I wish you would indicate on that map the direction. Make a line, and continue that line, showing where it comes back in the valley.

A. Here is a road coming from Harshaw—from Martinez to Harshaw. The water comes from above horse corral toward Saddle Mountain, and then runs half a mile or perhaps a mile; then it runs right down this Harshaw road.

Q. I wish you would indicate on that map the course of that road after you pass that mountain.

A. This map shows that this road runs up the valley to the letter C, southwest of horse corral, to the upper windmill.

It will be seen from the quotation just given that Mr. Cameron, the claimant himself, found an arroyo running from the vicinity of the horse corral in the direction of Saddle Mountain, which under the testimony of the Government is undoubtedly the peñasco referred to in the title papers. This furnishes one of the ingredients in the description of the north center monument in the title papers, and in connection with the Government's testimony, presently to be considered, leads easily to the conclusion that the north center monument, as originally placed, was in the vicinity of the horse corral and at the north end of the San Rafael Valley where it encounters the south slope of the Canelo hills. Mr. Cameron (R., 174) reenforces

this conclusion by his description of the Canelo hills as crossing this property from right to left, leaving the Santa Cruz Valley on one side of the range and the Babacomori on the other, and by showing (R., 175) that the northwest corner is only about 4 miles from the Sonoita River, being on the Sonoita side of the divide between that stream and the Santa Cruz Valley.

Witness admitted that the Bonillas and Roskruge northwest corners were 2 or 3 miles apart (R., 175), and stated (R., 178) that these two surveys were the only ones he had had made, and that the survey made by one McLaughlin and referred to by a number of witnesses for the Government was not made in his behalf, and that he simply went with McLaughlin to show him his monuments so that McLaughlin might correctly survey the "fourth standard south." Upon being confronted (R., 383) with his sworn testimony in another case to the effect that he had employed McLaughlin, that McLaughlin had gone there at his (Cameron's) expense, and that he (Cameron) had paid for his services himself, and that McLaughlin was not sent there by the order of any person, but went there to locate the grant so that he (Cameron) might know where the lines were, witness admitted that McLaughlin had been in his employ and had been paid by him The decrepitude of recollection which led Cameron to swear that he had not employed McLaughlin in this matter, when, as shown by his sworn testimony, he had employed him and paid him, is characteristic of a considerable part of his remaining testimony, and may

account for the issue of fact arising between what he states and what is stated by Mr. Richardson and other gentlemen whose character is as high as is possessed by any citizens of Arizona.

This reckless positiveness may also account for the testimony of witness (R., 178) to the effect that the northeast monument of the grant existed there at the time when he first knew the premises against the testimony of numerous witnesses for the Government to the effect that that pile of stones appeared there mushroom-like the morning following a visit to the premises by one of the Cameron claimants with his retinue of surveyors and monument builders. Witness Cameron admits that he was unable to find the north center of the grant when he first became acquainted with the property, and his testimony (R., 179–181) alternates between such statements (R., 179) as this:

> Q. Did you build it up at that time?
>
> A. No, sir.
>
> Q. You swear to that positively?
>
> A. Of course I do. I never touched them. I did not think that the monument itself cut any figure in it.

And this (R., 180, 181):

> Q. And you swear that you were never present at any time when any of these monuments were built up?
>
> A. No; different people may have put stones on them; I myself did on different occasions.
>
> Q. Did you do that?
>
> A. I did every time I got around, I suppose, perhaps.

Being asked further about the topography, witness testified that it is possible to cross the Canelo hills by wagon, there being two passes, the Muchachita pass and the Canelo pass, the latter pass being marked "Canelo pass" on Roskruge's map F–52 (R., 427), and that there is a pass through the Huachuca Mountains, known as Tanner's pass, about east of the center monument (R., 187).

The relevancy of this testimony as to the location of the Canelo pass will be appreciated by reference to the testimony of Angel Elias, above referred to (R., 20, 29, 30), where he testified that the tradition among old people at Santa Cruz was that the San Rafael grant extended as far north as Puerto del Canelo. Cameron's testimony as to the existence of Tanner's pass is also material in connection with photograph F–26 (R., 412) and the testimony of the other witnesses to the effect that the south point of what Bonillas calls the Sierra del Cobre is at this point: that copper has been and is found at this point and that there is a large spring there, thus making it a point conforming in its physical conditions to the title call for the northeast corner of the grant. That this alleged Sierra del Cobre extends as far south as Tanner's pass is further shown by Cameron's testimony (R., 184), to the effect that the Sierra del Cobre was the old name of the Huachuca Mountains, and that it goes to the south end of the Huachucas.

Referring to the east center monument (R., 186), witness testified that the country from the center monument in that direction is a rolling mesa, so level that

one can draw a team across to the bank of the Canada del Potrero, and that from the east center one can see El Caloso hill and the mesa on which the center monument is located.

Witness describes (R., 186, 187) the method by which the north center monument of this grant was found: That after searching all over the country for it, and at no time being able to find it, the parties at interest finally sent for R. C. Hopkins, then living in San Francisco, Cal. (R., 187), who, upon his arrival and on reading the title papers, said that this monument ought to be where the red hill could be seen "through an open in the mountains which was to be discovered in a clear place," and that when he said that, one of the men said that he could immediately take him to that point, and that this party immediately took witness and the others around where the north center of the grant is located, and that thereupon they "discovered the arroyo that leaves this north center monument that runs in the direction of the peñasco, and it was so plain to our minds that that was the locality intended and called for that we immediately knew it and have never had any reason to change our minds." When it is recalled that the arroyo referred to does not run toward the peñasco, for the simple reason that the true peñasco, as shown by the great preponderance of the evidence, is in an entirely different direction, and when it is further recalled that this red hill does not stand, as required by the title papers, in an open between the peñasco and the Sonoita Mountains, for the reason that

the peñasco does not exist where plaintiffs put it, and the Sonoita Mountains, according to plaintiffs' own testimony, is absolutely invisible from the north center monument, it will be seen that the great light which came to Mr. Cameron on this historic occasion was less in the nature of a discovery of the north center required by the grant documents than a culmination of a desire of long standing to secure within his grant the much-coveted water sources on the slope of the Babocomori and Sonoita valleys.

GEORGE J. ROSKRUGE was sworn on behalf of plaintiffs and testified to his being a surveyor by profession, having practiced surveying for about twenty-six years, and having held a number of official positions (R., 187).

He identified map, plaintiff's Exhibit F–52, as having been made by him, except as to the exterior light lines shown on the photograph of said map opposite page 427. The photograph just referred to omits a number of details contained on the large map used on the trial of the cause, and for that reason a duly certified copy of said original has been filed with the clerk of this court, and additional photographs have likewise been attached as Appendix III to this brief.

Referring to the survey shown on said map, witness testified that he had commenced making said survey in 1880 under employment from Mr. Richardson, there being present on said survey beside Mr. Richardson, Mr. Green, the predecessor in title to Mr. Richardson, and one or two other parties. Witness testified that he was there again in 1887, and made another survey, at

which time there were present Mr. Brewster Cameron, Mr. Buehman, the photographer, and some other parties (R., 189), Mr. Buehman at that time taking the photographs embodied in the record.

Referring to his first survey, that of 1880, witness testified that he went to the mouth of the Potrero Cañada, because Mr. Richardson took him there, and because while no one knew where the center monument of the grant was, the point on the Cañada del Potrero was well known as the south center of the grant, and on this first survey a measurement was taken from the south center, 200 cords north, in doing which some old ruins near the international boundary line were passed at a distance of 87 chains from the starting point. These evidently were the ruins which the Government witnesses describe as those of Old San Rafael, although witness testified (R., 190) that these buildings were not in ruins in 1875, there being some Mexicans living there at that time. Witness testifies that after running north 200 cords, or 5 miles and 16 chains, some old ruins were reached, and the party thereupon built a small monument there (R., 190). This was evidently the beginning of the pile of stones which Bonillas and others have testified to so confidently as the original center monument of the grant.

Witness testifies that on this survey of 1880 having reached the end of his line 200 cords north from the south center monument, he ran another line of the same length, 200 cords east, but failed to find the east

center monument, and never crossed the Potrero Cañada at all in running this line; he then ran from the center monument, as established by him, 200 cords north, and searched all over the country for the north center monument, taking Saddle Mountain as the Peñasco, because Mr. Scott, who was a member of the party, told them to do so, although witness did not believe that this was the Peñasco, nor did Mr. Richardson seem to believe it (R., 190), the latter apparently taking the Peñasco to be at the point selected by Bonillas as the Peñasco.

Failing to find the north center monument, witness testified that they went to the south center monument, and measured from that point to the southwest corner and San Antonio Pass, and then came up to the red hill which stands out prominently at the end of the Patagonia range, and looking for the northwest corner they found it at the foot of that red hill. In view of the fact that the *expediente* does not call for a monument at that point, and the further fact that Bonillas failed to find one also, and did not even look for one, because the title papers did not indicate that one had been placed there, the enterprise of Roskruge in finding such a monument proclaims his preeminence as a surveyor of Arizona land grants. This preeminence is still further exemplified in his testimony (R., 192) to the effect that the Sonoita Mountains can be seen from the north center monument, when it is recalled that both Bonillas and Cameron state that this is absolutely untrue.

Witness testified that on the survey of 1880 he found no north center, east center, or northeast corner monument, the latter two not being looked for at the time; but that the monument at the carricito, or Igo Spring, was located the next year with Mr. Richardson. (R., 193.)

Coming now to the survey made in 1887, witness testified that he at that time chained the whole grant from the south center to the north center, finding the latter at a tree with a pile of stones around it, and that witness had never been to said point since that time, his going there at that time being at the suggestion of Mr. Brewster Cameron. (R., 194). He found at that place what perfectly satisfied him as the north center monument of the grant, according to the calls of the *expediente*, there being there an arroyo running toward the oak tree *from* the peñasco, as located by Bonillas. As all the other witnesses testify that the arroyo at this alleged north center monument runs to the peñasco, and not from it, it would seem that the one visit made by witness to this point, under the guidance of Mr. Cameron and Concepcion Elias, was not a very thorough one.

From this point witness testifies that he went to the east center monument, which he described to be an old monument built of stone on the west edge of the mesa, stating that from this last point the vicinity of old San Rafael can not be seen. From this point witness went next to the southeast corner, the Jaralito, being the same as the northeast monument of the presidio of

Santa Cruz, at which point witness found a big monument at the Jaralito (R., 194). The force of this testimony of Roskruge as to the existence of a big monument on the Jaralito is somewhat affected as indicating unmistakably the southeast corner by the fact that Bonillas likewise found the Jaralito and a big monument at a distance of a mile or more from the Roskruge monument.

Witness then chained (R., 195) to the south center monument and completed the rest of his survey by triangulation. Referring to El Caloso Hill he testifies that there is not, to his knowledge, any other lime hill in the whole country (R., 195). After identifying some of the photographs tendered in evidence and already discussed, witness testifies to his having made still another survey in the San Rafael Valley, that one having been made in the month of September, 1880, and thus prior to the first survey for Richardson and Green, this survey of September, 1880, being made under directions of Surveyor-General Wasson, and its purpose being to run from the post at La Zanja 200 cords north and then 200 cords west, with a view of determining the location of such a survey with respect to Harshaw and the mineral country adjoining it.

On cross-examination witness testifies that his survey for General Wasson was made subsequent to a certain survey made by one Solon M. Allis, and shown in the record as plaintiff's Exhibit F 74. (R., 463.) Upon that survey Roskruge took as his initial point the post

erected by Allis at La Zanja, and proceeded as indicated by the following questions and answers (R., 197):

Q. About how far is that (the post in the cienega) from the center monument which you took in the survey of 1887?

A. Probably three-quarters of a mile.

Q. It is about three-quarters of a mile north of that center monument of 1887?

A. Yes, sir.

Q. You on that survey run north 200 cords, did you not, in 1880, for General Wasson?

A. Yes, sir.

Q. Or 5 miles and 16 chains?

A. Yes, sir.

Q. Now you found at the end of that an oak tree, did you not?

A. Yes, sir; I came to an arroyo, *on the right bank of which I found an oak tree blazed with a cross on it.*

Q. And you ran from there, you say, 200 cords toward the west?

A. Yes, sir.

It will thus be seen that Roskruge had no difficulty in 1880 in finding an oak tree with a cross on it, and an arroyo running by it, as the end of his measurement on the north, from the Slaven place taken as the center.

Further describing this locality, witness testified that this blazed tree bearing a cross is in the midst of rolling land, and indicated its location by the letter R on the original of his map, F 52, and stated that he reported to General Wasson the fact that he had found that tree on the edge of an arroyo. Witness

thereupon identified the report made by him to General Wasson, with its accompanying map, and these were tendered in evidence on behalf of the Government as defendant's Exhibit No. 1 and No. 2, appearing in the record at pages 467 and 468. A glance at the plat in question, in connection with the report, will show that Roskruge on that survey readily found what a month later he seemed unable to find, to wit, a north center, at a distance from the center of the grant approximately where the original survey says it was.

Just at this point the following quotation from his report, defendant's Exhibit No. 2, page 468, is exceedingly pertinent:

> TUCSON, ARIZONA, *Sep. 7, 1880.*
>
> Hon. JOHN WASSON,
> *U. S. Surveyor-General.*
>
> SIR: In accordance with instructions I proceeded to the San Rafael Valley, and at the place called La Zanja, where Slaven has now a stock ranch, I found a post marked "S. R. Z.," for the center of the San Rafael land grant. From this point I ran north 200 cordels, or 5 miles, 16.66 chains, to a point. At 5 miles and 20 chains I found *on the right bank of an arroyo an oak tree blazed*, the blaze being so old that the bark had grown over it, forming a kind of curtain. *I found indistinct marks on it, which might be easily traced into a cross*—that is, if it was painted, as was the case of the one marking the south center of the Canoa land grant. * * * I ascended a high hill at end of line, and from observation found that a line run due

south would not strike the mineral belt in Arizona, *the grant apparently being intended to cover grazing and agricultural lands only.*

(Signed) GEORGE J. ROSKRUGE,
U. S. Dep. Surveyor.

Witness testified that by this first survey of his, made for Surveyor-General Wasson, Harshaw camp was located a mile and a half to the northwest of the exterior boundaries, there being at that time, as well as at Mowry and Washington camps, also outside of his survey, a large number of mining locations and inhabitants engaged in mining.

Coming again to the survey made in 1880 for Mr. Richardson, witness testified that they adopted Saddle Mountain as the peñasco, because Scott, who was with them, kept saying that that was the peñasco, he having been "misled" into that belief by the people of Santa Cruz. From the testimony of the Government, which will be presently considered, it will be seen that Mr. Scott was not so badly misled after all, and that the people of Santa Cruz, acquainted with this locality for scores of years, and as a result of their acquaintance informing Mr. Scott that this was the *peñasco*, were more probably right in this matter than Mr. Roskruge, despite the latter's inherent conviction that this was not a *peñasco*. Even Roskruge, however (R., 199), admits that this Saddle Mountain, against which he seems to have conceived so violent a prejudice, is a very high, steep mountain, three hundred or more feet in height, and in this impression he is sustained by Bonillas, who

admits in his testimony, as above pointed out, that the Saddle Mountain so called, looks like a *peñasco*. Roskruge further admits (R., 200) that the *peñasco*, contended for by Bonillas and himself, is not visible from the south center of the grant, whereas the *peñasco* contended for by the Government is visible throughout the whole valley. The consistency with which Roskruge on this map of 1880 adhered to the position that the newly called Saddle Mountain was the peñasco, is shown by his cross-examination (R., 220–222) and the field notes of his survey, introduced as defendant's Exhibit 5. (R., 472–476.) The character of that cross-examination is exemplified by the following (R., 221):

> Q. From your notes I read the following bearings: north 57 degrees 4 minutes west from red mountain, peñasco. Is that the same Saddle Mountain?
>
> A. That is the same mountain.
>
> Q. I read as follows: Richardson and Scott, 11 a. m., on horses, went to arroyo draining toward the peñasco; is that the same as this Saddle Mountain on your map?
>
> A. That is the same one; yes, sir. * * *
>
> Q. I read again: R. R. Richardson went to top of peñasco; is that the same as the Saddle Mountain you got there?
>
> A. Yes, sir; the same Saddle Mountain. * * *
>
> Q. Again I read: The peñasco bears south 67 degrees west; is that the same Saddle Mountain?
>
> A. The same Saddle Mountain; yes, sir.
>
> Q. I read again: Red mountain distant from

the peñasco about 2 miles; is that the same Saddle Mountain?

A. Yes, sir; the same Saddle Mountain.

Q. I read again: Another arroyo that runs toward the peñasco; is that the same Saddle Mountain?

A. Yes, sir; the same, marked on that map.

Witness admitted (R., 221) that his field notes (R., 475) showed that he found on that survey near Roth's camp, which is at the head of the Santa Cruz Valley (see defendant's Exhibit No. 6, R., 476), a ravine or valley that drains toward the peñasco, and at which was found a pile of stones 3 feet high and 3½ feet at the base with three large oak trees near them, but no mark on either of them. Witness indicated this point on the original of his map (plaintiffs' Exhibit F 52) by the letter G, and he stated that the oak tree is near that point (R., 221). It would seem that this location very closely conforms to the description given in the *expediente* for the north-center monument, there being at this point an oak tree, a large pile of stones, both of them on the side of a valley or ravine draining toward the peñasco, or Saddle Mountain.

Further referring to the field notes of Mr. Roskruge (R., 476), being the result of his survey in October, 1880, it will be noted that the red mountain selected by him as his northwest corner lies between the peñasco or Saddle Mountain and the Sonoita Range, all three of which, from said field notes, were apparently visible to Mr. Roskruge on that survey. This location of the northwest corner is superior to the Bonillas

location, at least in this respect, that the red mountain is here described as visible between the objects named in the *expediente*, whereas in the Bonillas survey neither the Sonoita Mountains nor the true peñasco are visible.

On redirect examination (R., 202), referring to the Wasson survey of 1880, witness testified that there were no rocks at the bottom of the blazed tree, at which his line, 200 cords in length, ended, and that the arroyo at that place runs from northwest to southeast, and does not run either toward Saddle Mountain or toward the Peñasco, and witness testified (R., 219) that it is the universal rule of construction by surveyors that the language in the title paper to the effect that an arroyo runs toward a certain place, refers to the way the water flows; that a road or fence runs two ways, but a river or arroyo runs but one way—that is, the way the water flows. Witness showed, however (R., 203), that this Saddle Mountain is northwest from the oak tree, and this arroyo runs from the northwest, and his map, Government Exhibit No. 1 (R., 467), shows the same thing, and shows an arroyo running in the same direction as the Peñasco While it may be true that the expression "an arroyo running toward the Peñasco" ordinarily means that the Peñasco is down stream on said arroyo, where, as in this case, there are found at a given point all the other natural conditions complying with the call of the *expediente*, it requires no perversion of language to construe the words "toward the Peñasco" as being up the arroyo, since the point of

observation at the oak tree was that of a person looking up a dry channel coming by the Peñasco, and thus in a certain sense toward it. Even if, however, the arroyo that Roskruge indicates on his map be construed not to conform to the *expediente*, in that it runs from and not toward the Peñasco, the other arroyo referred to in his survey of October, 1880 (R., 475) confessedly drains toward the Peñasco or Saddle Mountain, as does the arroyo testified to by Mr. Cameron and hereinbefore discussed.

Witness testified (R., 203) that in running from the blazed tree 200 cords west, his line ended 3 or 4 miles from the red mountain. Witness also testified that on his survey of October, 1880, he found no arroyo in the vicinity of the horse corral that runs either toward Saddle Mountain or the point marked peñasco, but that they all run toward the south; and to this effect he read from his field notes of that survey showing a search by the surveying party for the tree with the crosscut upon it, a monument of stones, and a small arroyo draining toward the Peñasco, this search having been made in the vicinity of the end of 200 cords from the center monument, and resulting, according to the field notes, in a failure to find such natural objects. He further testified that on the survey made for Mr. Richardson he did not go to the blazed tree which he had found on the Wasson survey, for the reason that the information was too vague about that tree and the marks, there being nothing to his mind to indicate that it was *the* tree. He testified that the blazes had been

cut there a long time; and apparently for the purpose of showing that this blazed tree which he located in 1880 for Wasson could not be the tree constituting the north center of the *expediente*, he was recalled (R., 231), and gave testimony as to his having had occasion to cut down oak trees in order to discover whether they bore marks on them that had been placed there years before by surveyors. He produced in court a piece of wood to show that in some instances the marks made on the outside of the bark disappear and are found internally, the mark in the particular instance shown by said wood having been made in October, 1874, and having been found on the inside of the tree upon its being cut some years later. Despite this testimony, the fact still remains that Roskruge reported to Surveyor-General Wasson an oak tree 200 cords north of the La Zanja, with a cross upon it, as the apparent north boundary of this grant, and based upon such discovery even made observations to the effect that this was a grant apparently intended to cover only grazing and agricultural land (R., 468); and even Bonillas, in an excess of caution and in order that his north center monument, 6 or 8 miles from the first Roskruge north center, might appear to be equally worthy of confidence, took the pains to mention in his testimony (R., 101) that he found there "a very large big oak tree with *some scars on the trunk* and a pile of stone around it." It seems a pity that, after Bonillas had gone to the trouble to mention in his testimony the existence of some scars

on this oak tree, claimants should have proceeded to introduce testimony tending to show that these scars could not possibly have been placed there at the time the grant was originally surveyed. Roskruge also testified (R., 196), referring to his east center monument, that the mesa on the east of the Cañada del Potrero runs north and south for a considerable distance from the east center monument. This testimony is relevant in that the only description in the title papers as to the east center monument is that it is located beyond the Potrero Cañada on a mesa contiguous thereto where a pile of stones was placed. As the canyon or cañada is miles in length, and the mesa east of it is likewise miles in length from north to south, absolutely the only object fixing the east center at the point claimed by Bonillas is a pile of stones, with no testimony whatever to the effect that such pile is the ancient east center monument, but on the contrary with abundant testimony on behalf of the Government to the effect that such stones were placed there about the time of the survey made under the auspices of the Camerons. With such an uncertain object as a pile of stones to fix this monument, especially in view of the doubtful origin of this object, the duty of the court will be to fix the east center of the grant at the first point of the mesa east of the Cañada Potrero, and on a course due east from the center monument.

Claimants also introduced in evidence (R., 203), pages 427–431, the testimony of witnesses José María Montoya, Alejandro Apodaca, Jesús Dominguez, and

Xavier Dominguez, taken before the surveyor-general (the witnesses being dead), (R., 91) to the effect that they had always known the ranch of San Rafael de la Zanja since it adjoined the pueblo lands of Santa Cruz, their ancestors having been among the *parcioneros* of the grant, and having participated in the cost of its purchase; that said ranch was occupied by the people of Santa Cruz for cattle and for residences at an early date, but was abandoned by the people on account of the hostile Indians; that the south center of the grant had always been known as at the mouth of the Cañada del Potrero; that from the center to the south line of the grant there is running water in the aggregate for more than half the distance; that the heirs of the *parcioneros* and of Ramon Romero, the party named in the title papers, had always acted in harmony in the administration of said property, having paid a considerable amount to the American Government as taxes, the proportion paid by each being according to the amount of stock each had upon the grant, and, finally, that there was mineral within the grant, at the Patagonia, Washington, San Antonio, and other mines.

Concepcion Elias, sworn on behalf of plaintiffs, testified as to his having resided all his life at Santa Cruz, Mexico, and gave his age as 68 years; that he had always known the San Rafael de la Zanja grant, his father having been one of the *parcioneros*, and having paid part of the purchase money (R., 203, 204); that he knew Ramon Romero, the only one of the *parcioneros* named in the title papers; that the

latter lived at Santa Cruz and went to California and never returned; that at his earliest recollection the ranch of San Rafael de la Zanja was settled and various people were living on it, and that witness himself subsequently lived on the ranch or grant; that there were as many as 20,000 head of stock on the ranch when witness first knew it and for years subsequent thereto (R., 204, 205). Being asked if he knew any of the corners of the grant, witness testified that he knew four, to wit, El Carricillo, the Cerro Colorado, San Antonio, and Jaralito Being asked as to whether he knew the south center monument, he replied that it was a peak that rises above the Washington camp between the south and east (R., 205), a very evident mistake, due either to indifference or lack of knowledge of the subject about which he was attempting to testify. Witness testified that he knew the monument at the mouth of the Potrero and was the person who had shown it to Bonillas as a monument of the grant; also that he knew San Antonio pass; that it had always been so called; that he knew the monument of the San Rafael grant located at two small peaks near that pass, and that he had shown it to Bonillas as a monument of the San Rafael grant, because the old people, including his father, had told him that the lines of the ranch reached there and at that point joined the lands of the neighbors and also the commons of the town of Santa Cruz (R., 206), and that said commons also reached up to the monument at the mouth of the Potrero Cañada.

Witness testified that he knew the place of La Zanja and also the old ruins of San Rafael, and that the latter were about six or seven hundred yards from La Zanja, and that he was informed that this place of old San Rafael is that at which the owners of the grant settled originally, it having been abandoned on account of the Indians (R., 206). It will be noted, however, that "San Rafael" is referred to in the title papers as marking the center point and as thus existing at the date of the grant, so that this point of settlement by the owners of the grant could not be the place named in the title papers.

Witness testified (R., 206) that the ranch or grant extended toward the north to what they call Carricito, joining the Babacomori ranch to the north, Carricito being at the edge of the Cobre Mountain at the spring where Mr. Igo lives, and that said copper mountain is a portion of the Huachuca Mountains. Witness testified (R., 207) that that spring was commonly called *Carricito* by the old people, the owners of the ranch.

Being asked to describe the north center monument, which it will be recalled was not located by tradition among the people of Santa Cruz, but by the importation of Mr. Hopkins from San Francisco, witness fixed it at a place where there is an oak tree with a monument at its foot, and that from it the red mountain can be seen in an opening between two mountains and that this tree is on the edge of an arroyo running *to the east.* Witness then corrected himself (R., 207) to the extent of stating that this arroyo runs *to the north*, and afterwards under the guidance of a leading question stated

that it ran toward the Peñasco, which it will be recalled is toward the southwest.

Witness describes this *Peñasco* as being a high very yellowish round-like peak, and that it was called by the old people of Santa Cruz the "Peñasco of Sonoita, because it runs to Sonoita."

Referring to the east boundary of the grant, witness testified that it is in the "draw of a very high table-land on the east side of the center point," and that he had known this monument of the grant for many years from the owners of the grant themselves, whether the Camerons or others does not appear.

As bearing on the tradition connected with the extent of this grant, the following from the testimony is relevant (R., 208, 211):

> Q. What part of this land within the monuments of the land you have designated did the owners occupy?
>
> A. I do not know what part; *they used to say it comprised 4 sitios.*
>
> * * * * *
>
> Q. How many sitios were there in this grant according to the old people down there?
>
> A. *They said there were 4 sitios;* I do not know myself.

Witness testified that the owners of this land pastured all over the valley between the four points he had mentioned and running to the Babacomori lands and lands of Terrenate (R., 208), and that at the place called Coches, which is on the north slope of the Canelo hills, the people from Babacomori and from Santa

Cruz used to hold round-ups (R., 384), after which "the cattle of the Babacomori people they used to take toward the Babacomori and the cattle of the Santa Cruz people they used to leave in the land."

Witness referred to the extent of Indian hostilities in the early days as having led to the abandonment of the ranch, but said that such hostilities did not exist after the establishment of the international boundary line (R., 208); and that during the French invasion Governor Pizcarra had lived on this ranch, near the international line; that there were no ruins in the San Rafael Valley, except at new San Rafael and old San Rafael, the latter being near Slavens's place and new San Rafael being at Viviano's place, which, according to Roskruge map F–52 (R., 427), is on the east side of the river, about a mile and a half from the international line.

Referring to the peñasco, witness testified that this could be seen from the valley of San Rafael as far down as the international line. Since the testimony of the other witnesses shows that Saddle Mountain can be plainly seen along the whole valley, while the alleged peñasco can not be so seen, it would seem to be evident that the peñasco referred to by witness Elias is, after all, the natural object which the Government testimony shows to be the true peñasco.

Witness stated that his visits to these various monuments with Roskruge and Bonillas and others had been under the employment of Mr. Cameron, who had hired him to go around to these monuments (R., 212); and referring to the town of Santa Cruz he stated (R., 213)

that it had for twelve or fourteen years been governed by an *ayuntamiento*, but prior to that time it had none, there being only a justice of the peace there.

COLIN CAMERON, one of the plaintiffs, being recalled (R., 214), testified as to the topography between the south center monument and the southeast corner of the grant, and to the effect that in going between these points one passes over mesas and arroyos and broken country until Bonillas's southeast corner is reached, at which there is located the Jaralito; that the first time he had been to this corner was in the summer of 1883, when a considerable amount of *jaralitos* were to be seen within 200 yards of the monument of Bonillas.

On cross-examination witness was shown the map made by Roskruge and the letter written by Mr. Rochester Ford to the surveyor-general of Arizona accompanying that map (R., 468, 472), and stated that Mr. Ford was his duly authorized attorney at that time. It will be noted from this letter that Mr. Cameron's position then was (R., 469) that "the lands specifically and definitely claimed" by him are "the lands represented in the accompanying map of George J. Roskruge and are the same lands sold by the Mexican State of Sonora, according to the title papers of the San Rafael de la Zanja grant," and that this survey of Roskruge, which Mr. Cameron, through his duly authorized attorney, says is a correct representation of the grant in question, fixes the southeast corner of the grant and the Jaralito miles away from the point adopted by Bonillas.

HENRY BUEHMAN, presented by claimants, testified (R., 215–218) to the correctness of the photographs tendered in evidence by plaintiffs and to the effect that the monuments shown therein appeared to him at the time the photographs were taken to be old monuments, because there was grass growing right through the rocks.

IGNACIO BONILLAS, being recalled on behalf of plaintiffs, testified (R., 222–225) that in his opinion the expression, "arroyo running toward a given object," means that that object is in the direction in which the water runs or flows; and that the water from the north center seems to run directly toward the peñasco, as located by him, but it does not run directly toward Saddle Mountain, that being considerably to the south of the peñasco.

Referring to the grants surveyed by him in Mexico and in which large excess of area surveyed over area granted was discovered, and a list of which as furnished by witness has already been discussed, witness defined *demasias* and legal area as follows (R., 225):

> Q. You gave in each case the *cabida legal* and the *demasias;* that is, the quantity of land purchased and paid for as shown by the title papers, is it?
>
> A. Yes, sir.
>
> Q. And the *demasias* is what?
>
> A. The excess of area found within the monuments established after deducting the *cabida legal* from the total area.

Witness states that these surveys were made by him

under the Mexican law of 1863 and the laws amendatory thereof; that to ascertain the amount of public land the Government employed persons to make surveys of public lands and *demasias*, and gave them as compensation one-third thereof (R., 26); that in some instances it was found that the *demasias* had been absorbed by the concession, and that in one instance, the Cuchuta grant, the concessioners in surveying paid no attention to the monuments bounding the grant, but simply to the *cabida legal* or legal area (R., 227).

Witness admitted that a denouncement of that portion of the San Rafael de la Zanja grant lying south of the international line had been made in 1886 by Mr. Concepcion Elias, under the name of the Encinitos tract (R., 227), it having been petitioned for as public land (R., 235), and that witness was now the owner of that tract (R., 227). Witness Concepcion Elias testified to the same effect (R., 385).

Over objection from the Government that it was incompetent to prove the contents of a written decree by parol evidence, Bonillas testified that some judge of the first instance at Magdalena had issued a direction to the district judge at Guaymas to issue the decree or decision to the effect that Green was entitled to all of the lands of this ranch to the outside boundaries, or rather that witness thought that was the fact (R., 228), but that witness now held the title to that portion of the grant south of the international line deraigning not through Mr. Green, but from the Government. In connection with this matter witness offered the following explanation (R., 228):

Q. Did you deraign from the Government?

A. Yes, sir. I would like to explain, if you will allow me. I think there was an application made for a survey of the Encinitos. The publications were made summoning the owners, those that might have any claim to those lands, to appear and show why no such survey should be made. Nobody appeared; nobody claimed the lands; consequently the Government, believing that it was its own land, issued title to it.

These proceedings recited by Mr. Bonillas, disposing as they do of all of this San Rafael de la Zanja ranch lying in Mexico as public land by that nation, are very instructive as showing what would have been the character of the title held by the claimants to so much of the land within the outboundaries beyond the 4 sitios actually paid for, were this territory still a part of Mexico.

Mr. Bonillas also referred to the law governing the location of the *cabida legal*, as disclosed by the expediente of the resurvey of the Chupisonora grant, where the State surveyor says: "Article 4 of law No. 197, of the 14th of May of the present year (1852), leaves the selection of the land to their titles to the possessors" (R., 234). Witness stated that from this *expediente*, which is in the archives at Hermosillo, it appears that when the surveyor was going to locate the *cabida legal* he cited this law and summoned the owners so that they might make the location. Witness stated that he did not know whether this was a State or Federal law. The contents of this law, a copy of which has been

since the trial secured from the archives at Hermosillo and is attached to this brief as Exhibit B, will be hereinafter discussed. It is sufficient at this stage to state that the purport of the law is correctly cited by Bonillas, and that under its terms the right of grant claimants consisted not in a definite tract of the quantity paid for within the out boundaries of their grant, but rather of the right to select such quantity within said out boundaries. This law throws considerable light upon the system of administering lands under the Mexican Government, and is extremely relevant as bearing on the question of whether this grant at the date of the Gadsden treaty had been "located" within the terms of that international instrument.

COLIN CAMERON, being recalled (R., 229), testified that the inclosure marked "Cienega pasture" on plaintiffs' Exhibit F–52, being in the northeast portion of the grant as surveyed by Bonillas and Roskruge, contains about 600 acres inclosed by a wire fence, and is the same tract of land involved in the case of *Cameron* v. *United States*, being No. 1180 in this court, October term, 1889, and being reported in 148 U. S., 301.

Being asked as to the topography of the country to the north and northwest of the center monument (R., 229), witness testified that the water from Saddle Mountain flows northwest: that there is a ridge about 200 cords north of La Zanja, above the sheep corral and between that point and the horse corral, as indicated on the Roskruge map, Exhibit F–52, and that none of the arroyos on the south side of that ridge run toward Saddle Mountain, but that all run south. It will be noted,

however, that witness does not modify his former testimony that there is from the vicinity of this horse corral, and presumably north of this ridge just referred to, a drain that carries water directly toward the Peñasco, turning thence south and running into the Santa Cruz River.

Referring to the north center located by Bonillas, witness testified that the arroyo running toward the peñasco at that point does not run toward Saddle Mountain, but runs more north than that object (R., 230), and that Saddle Mountain can not even be seen from anywhere in that vicinity, and that even the peñasco, located by Bonillas, can not be seen exactly from the north center monument (R., 230), and finally that Cottonwood ranch is near the northwest corner, but outside of the grant as surveyed by Bonillas (R., 231).

As bearing on the question of whether in asking for this grant originally it was ever the intention of the original petitioners to secure that portion of country lying north of the divide on which Saddle Mountain is situated, the testimony of Cameron (R., 230) is instructive in showing that the country lying north of this divide and between the north center and the northwest corner, as located by Bonillas, is so very rough that it is impossible to get through with a wagon. Witness being asked what was the condition of the country going from there, as to its safety in Indian times, answered: "Nobody would go there—it would be very dangerous indeed." The testimony of the witness

as to the topography of the country between the north center and the northeast corner (R., 230) shows that this section of country is similarly rough, and throws strong light upon the improbability of there having been any attempt made by the original grantees to secure any land other than the Santa Cruz Valley proper, with its abundant water and splendid pasturage.

In conclusion of their case in chief, plaintiffs tendered in evidence (R., 235) extracts from the record in the case of *Cameron* v. *United States*, No. 1180, October term, 1889, Supreme Court of the United States, above referred to; also the decision and mandate of this court in that case. These papers appear in the record at pages 450-458, and were offered in support of Cameron's plea of *res judicata* set up in his answer and hereinbefore referred to. The legal effect of these proceedings, taken in connection with the decision in that case (148 U. S., 301), will be hereinafter discussed.

STATEMENT OF DEFENDANTS' TESTIMONY.

R. R. RICHARDSON, sworn on behalf of the Government (R., 235), testified that he had lived in southern Arizona since April, 1880; had held official positions in his county, and had been engaged during his residence in cattle, stock, and mining business. He described the mining camps included within this grant as surveyed by Bonillas: Harshaw having been a camp when he first went there, having some 500 or 1,000 people with a large number of mining locations, and the same being true of Washington and Mowry camps (236, 237). He gave the value of some of the mining claims within the

Bonillas survey as follows: That of the Duquesne group being $350,000; the Pride of the West, $125,000; the Holland, from $50,000 to $100,000; the Pool group, $60,000; the Empire, $40,000; the Belmont, $100,000, and the San Antonio, $75,000; and stated that the country all around these camps was mineral bearing.

Witness testified that when he first came to the premises in 1880 he found a man named Slaven living at La Zanja, but that there were at that time no monuments of stones in that vicinity; and that the San Rafael ruins were at the old Enriques place, which, it will be recalled, is about 3½ miles south of the center monument as located by Bonillas. (R., 238, 239.)

Coming to his acquiring an interest in the land, Richardson testified that he first met Mr. Green, the plaintiff, in Tucson in the summer of 1880, when he entered into a contract for the grant with him, paying him in all $7,000; that Green showed him what the grant was, and he then bought out Green and one or two settlers. Referring to the monuments shown him by Green, witness stated that there were pointed out to him a monument at San Antonio Pass as the southwest corner, being a pile of stones at two small hills; also the south center monument, being a pile of stones not over 2 feet high, and that these were all Green showed witness, although they searched for other monuments (R., 241) at Igo's and elsewhere.

Witness testified that looking up the valley there is a very prominent peak to the northwest visible from

almost anywhere in the valley; that this peak is a very abrupt one and stands alone, and has always been known by him, both upon information given him by Mr. Green and other people who lived there, as the Peñasco, and witness never heard any other name given it until the trial of this cause. Witness denied that he had ever been on top of this peak with Mr. Cameron, or had ever told him that that peak was Saddle Mountain and not the Peñasco, or that he had ever had any conversation with him about it; that he had never heard the peak marked Peñasco on the Roskruge map called the Peñasco, but, on the contrary, he always heard the so-called Saddle Mountain called Peñasco, and that he told Roskruge on his survey that the peak marked Saddle Mountain was the Peñasco.

Witness testified that going north 200 cords from La Zanja he had not found any tree with a cross on it, but had found about 8 miles from La Zanja that the water runs toward the peñasco and then turns and comes back into the Santa Cruz, and that this is true as to a point directly east of the windmill held by Mr. Cameron and shown on the Roskruge map (R., 243); that the peñasco is on the watershed or divide between the Sonoita and Santa Cruz rivers, and that the water running from the upper part of the valley runs south of the windmill of Mr. Cameron, returning to the Santa Cruz River and striking it 3 or 4 miles north of La Zanja. Further describing the topography at the extreme upper end of the Santa Cruz Valley (R., 244), witness testified:

Q. Is that country covered or interspersed—scattered with oak trees?

A. Yes, sir.

Q. Are there level table-lands cut by gullies, table-lands called mesas?

A. Yes, sir.

Q. These mesas or table-lands are full of gullies?

A. Yes, sir.

Q. Is there such a place 300 or 400 cords north of La Zanja, or 6 or 8 miles north of La Zanja, a gully that runs to the peñasco, as you call it?

A. Yes, sir.

Q. And are there oak trees on the mesa?

A. Yes, sir; I think so; oak trees around the center of it.

Describing the Canelo Hills, witness stated that they were a very rough range, with only one pass through them, and that they joined the Huachuca Mountains just north of Tanners Pass, where a man named Campini has some copper and silver mines, and that at this junction of the Canelo and Huachuca mountains there are some nice springs, the waters of which flow into the Potrero Creek. (R., 244, 245.) The testimony of Mr. Richardson just quoted shows the existence at the east end of the Canelo range of all the natural objects used in the *expediente* to describe the northeast corner of the grant.

Coming to a description of the northwest corner, witness testified (R., 245) that looking toward the west from a point 6 or 7 miles east of Saddle Mountain,

there can be seen a red mountain down in the valley between the Saddle Mountain and what they called Harshaw; that the general color of that range of mountains is red, extending as far south as the Mowry Gulch; that there are red hills between what is called by Bonillas the Saddle Mountain and the peñasco, and that the Sonoita Mountains lie west of the so-called Saddle Mountain and peñasco.

Witness further testified that when he sold out to Cameron he merely transferred his agreement with Green (R., 246), and that he never showed Cameron a monument at Igo's or at the center, as testified to by Cameron, and in fact he never saw one at either place (R., 246). On cross-examination witness stated that there had been considerable bad feeling between him and Cameron at different times; that at the time he transferred to him they spent five or six days on the grant, and passed the red mountain at the northwest corner of the Bonillas survey, which they both took to be the northwest corner, as represented by Green and the expediente; that witness accompanied Cameron to the San Antonio Pass and showed him there the monument that was pointed out by Green and the people of Santa Cruz as their monument, and also took him to Carricillo Spring and told him that that spring was the one called for in the title papers, but witness is confident that he never showed him a monument there; that at that time the north center monument was not pointed out to Cameron, since its location was not known (R., 247), and that while at the time witness sold to Cameron he

showed him the points that had been pointed out to witness by Green, he did not represent to him that Cameron would get the mountains, as he never thought that the mountains would go with the grant, but witness admitted that in transferring the grant to Cameron he had expressly reserved the Marshal mine in which he was interested (R., 248, 249)

Witness testified to having employed certain Washington attorneys to represent him in getting a confirmation from Congress, and identified a copy of a letter to them and also a number of other letters bearing on this transaction (R., 249, 250), said letters being found in the record at page 458 et seq.

Referring to the appearance of the country, looking from a point at the head of the Santa Cruz Valley, witness testified that from such point the peñasco identified by Bonillas (R., 248) can not be seen, nor can said alleged peñasco be seen by one looking toward the north from the alleged center (R., 252); but that looking west the peak near Washington camp, which plaintiff claims is El Caloso, is a very prominent landmark, although the title papers say that El Caloso is a low hill.

V. H. Igo, being called for the defense (R., 252), testified as to his having gone to that country about 1882, when he settled at a spring at the point of the Huachuca Mountains, buying out a man named Haines, then living there under a possessory title (R., 257). Witness testified that he developed the property, making improvements that had cost in the

aggregate about $8,000 or $10,000, and that there were a number of other settlers in the canyons situate within the grant on the north slope of the Canelo hills (R., 252); that when he went there, there were no evidences of a grant, no monument, claim or boundary marks (R., 253–4), and that the monument near his spring and shown on the photograph introduced as Exhibit 37, was not there when witness went there to live, but was put up in 1884 or 1885. He testified that he saw it the next day after it was built, there being present on this occasion Colin Cameron, McLaughlin, the surveyor whom Cameron at first denied having employed, and subsequently, as above pointed out, admitted that he had employed and paid, and also a number of other parties. Witness recalled the circumstances of the building of this monument apparently with great distinctness, from the fact that the episode was marked by hot words on both sides, accompanied by the attempted use of a gun (R., 254, 255).

Witness remembered the survey of 1886 or 1887, when Roskruge was there accompanied by Brewster Cameron. He fully identified the so-called Saddle Mountain as the true peñasco, and stated that he had never known any other name for it; said that he did not know the Mexican name of the spring at which his ranch was situated, but that the mountain at that place was called Huachuca and he never heard it called Sierra del Cobre, or indeed heard of any copper in that range nearer than about 8 miles south of his place

where Campini is located, and at which point there is a large spring (R., 255, 256). Witness further testified that the Bonillas monument is a mile and a half east of his spring and on lower ground than the spring. Since the title (R., 528) shows that this monument was *above* the spring known as Carricillo and not below it, is evident that Plaintiff Cameron and Surveyor McLaughlin in building this monument in 1884 used poor judgment in selecting the location for it.

On cross-examination (R., 257) witness gave further details as to the building of this monument, stating that he saw the parties piling the rocks up (R., 258) and indeed carrying the rocks for the purpose of constructing the monument'(R., 259); that the monument is higher now than it was then, and that when he first became acquainted with that country there was a wagon road along there running from Huachuca to Harshaw and Santa Cruz Valley, and that at the time he secured this spring there were no *carricillos* or *tules* at the spring.

Witness testified (R., 260) that he had bought some shares in the grant in 1884 in order to protect himself in case the grant claimants took him in. His documents showing acquisition of title appear in the record as defendants' Exhibits 12 and 13 (R., 486–489).

GEORGE J. ROSKRUGE (R., 261), recalled for further cross-examination, testified that the high hill on which United States mineral monument No. 2 is situated is located at the Alta mill site shown on plaintiff's Exhibit F–52, and that said hill is as prominent as Saddle Mountain.

The relevancy of this high hill at Alta mill site as bearing on the northwest corner will be noted hereafter.

JAMES FINLEY, called on behalf of the Government and as a witness in his own behalf, being one of the codefendants (R. 262), testified that he went to Harshaw in March, 1880, and engaged in mining, and that Harshaw at that time had 250 or 300 people and covered 2 or 3 miles, including a great many mines and locations. Witness then named some of the principal mines and mentioned the amount of development on them, and stated that he was the owner of the Alta mine, which is inside of the survey, and that the peak near the Alta mine, on which mineral monument No. 2 is located, is yellow and red. Witness testified that when he went there there were probably a hundred people engaged in mining in Washington Camp, there being 200 or 250 people there now similarly engaged, with investments in that vicinity of something like $800,000. He testified that he was familiar with the headwaters of the Santa Cruz River, and that looking northwest from La Zanja or Slavens's place, the so-called Saddle Mountain can be seen as a sharp peak, but that this natural object has always been known in that community as the Peñasco; that he knew the place now claimed as the center of the grant in the early days, but had never known it to be called San Rafael, and that he never saw a monument of stones there when he first went there (R., 266). He testified that going north from the center 6 or 8 miles the general trend of the

country is to the west, but that the water courses "zigzag around" as they go in different directions.

Bearing on the topography at the north end of the San Rafael Valley, witness testified as follows (R., 267):

> Q. Have you been up 8 or 10 miles north of the Slavens' place?
>
> A. Seven or eight years since; yes, sir.
>
> Q. What is the character of the country as to forage, trees?
>
> A. Up on the sidehills you find oak trees and juniper.
>
> Q. How about the water trend up about that point?
>
> A. The gullies all trend to the west and toward peñasco; from the north they trend directly to the west.

From the testimony just quoted, it will be seen that at the north end of the valley there are arroyos trending to the west in a broken or mesa country covered with oak trees, thus answering all the *expediente* calls descriptive of the north center monument.

Witness testified that he had never heard of any Sierra del Cobre or copper ridge, nor seen any copper out toward Huachuca, which it will be recalled is a military post in the north end of the Huachuca Mountains; that there was no monument at Igo's when he first went there (R., 267); and witness is positive that there was no monument there from 1880 to 1882 (R., 268).

On cross-examination witness testified that the Sonoita hills or mountains are the northern end of the

Patagonia range (R., 267). It will be noted from a reference to the original of plaintiff's Exhibit F 52, that the high hill on which Mineral Monument No. 2 and Alta mill site are located, which is a red hill (R., 263), lies between Saddle Mountain, the true peñasco, and the north end of the Patagonia range, which Mr. Finley fixes as the *locus* of the Sonoita hills or mountains, thus making this hill answer precisely the descriptive call for the northwest corner given in the *expediente*.

Julius Kunde, sworn on behalf of the Government (R., 271), testified that he had lived at Lochiel, within the grant as now claimed, since 1893, but had lived on the grant ever since 1879; that he worked for claimant Cameron as foreman for thirteen years (R., 364), and that during that time he had been in the occupation of riding the range constantly; that when he first came there he learned from the Mexicans at Santa Cruz the location of the peñasco, which is a point which can be seen from the mouth of the Cañada del Potrero as well as the place called La Zanja, and looks like an abrupt bluff, this point being the same place marked by claimants Saddle Mountain, and that no other point had ever been called peñasco. Referring to the other point alleged to be called peñasco, witness testified that it can not be seen from La Zanja, being cut off by ridges and arroyos, as it stands lower than the so-called Saddle Mountain, and is 2 or 3 miles over on the Sonoita side of the divide between the Santa Cruz River and the Sonoita River, on the crest of which stands Saddle Mountain or the true peñasco (R., 273).

Referring to the topography of the country in the neighborhood of horse corral as located on the Roskruge map, Exhibit F 52, witness testified that said corral was on the slope of the Canelos; that the Canelos are very rough and high, being passable through only one or two passes, and that the country from the horse corral to the northwest is a rolling mesa until one gets to the divide on which the peñasco stands, when the country becomes again very rough.

Being asked as to arroyos in the direction of the peñasco (R., 274, 275), witness testified as follows:

> Q. You know where this arroyo or this wash is that Mr. Cameron has laid down here, do you, at the horse corral, in pencil, runs westward and turns down toward the Santa Cruz?
>
> A. That arroyo that comes over the road, you mean?
>
> Q. Yes, sir.
>
> A. That is the same arroyo that is between the Santa Cruz River, that comes to La Zanja ranch—it comes near there.
>
> Q. Does it run west?
>
> A. It only runs west about half a mile, and then it runs south a little; then it turns and goes toward the Santa Cruz.
>
> Q. Where it runs west does it run toward the Peñasco?
>
> A. Yes, sir; toward the Peñasco for about two miles, a little above the Frazier mine to the west, and then makes a turn at the horse corral, and then turns off into the Santa Cruz River, the valley; but it is dry up there in the dry season.

Witness then explained that the Frazier mine is west of the Canelo hills, and about 3½ miles east from Saddle Mountain or the Peñasco, and that this arroyo starts from the Frazier mine and runs toward the Peñasco for about 2 miles, and that there are some oak trees where this arroyo runs toward the Peñasco (R., 275). He also testified that he was acquainted with the San Rafael ruins, they being about 3 miles below Slavens, and a little over a mile from the international boundary line; that there were two San Rafaels, one San Rafael de la Zanja, at Slavens, and about a mile north of the center monument claimed by Cameron, and the other old San Rafael at the place above named, the latter being so called by the Santa Cruz people. Witness testified that the old ruins at Cameron's were all grown over with grass, with *metates* or Indian grindstones over the ground, and that the old Santa Cruz people did not know who had lived there in former times, and that while he knew the pile of stones now claimed as the center monument, there was no monument there when he first went there, and that he first noticed the monument in 1883 or 1884, after Cameron came there, when it was smaller than it is now (R., 276–278). Witness stated that he first went to Igo's in 1880, and had been there a great many times since, being familiar with the country; that he had seen the northeast monument claimed by Cameron, it having been pointed out to him by the latter, and that when he first knew that country there were only two or three rocks there together at that point, but that they marked a mining location

(R., 278–279), and that this became a large monument in 1884, when McLaughlin made his survey; that he had never heard the north end of the Huachuca Mountains, at which this monument is located, called the Sierra del Cobre, nor heard of copper ever being found in the Huachucas at Igo's place, but that it had been found at the south end of the Canelo range, where Tanners Pass goes through, being 10 or 12 miles south of Igo's place, at which place there are also found two springs, forming a kind of *cienega*, where he had heard that the Mexicans in olden times had found copper, and that this place was about 3 miles from the end of said Canelos, and less than 20 miles from La Zanja; that there were no *carricillos* or *tules* at Igo's spring when witness first came to that country (R., 283–285), and that said spring at Igo's was higher than the pile of stones constituting the alleged northeast monument (R., 290).

Witness testified that he had been at the northwest corner, as located by Roskruge, and had himself built up a monument there at the place where J. W. Leak, one of the Government witnesses, formerly resided; that he had seen a great many monuments, or piles of stones, when riding through that country, and of the same kind as those around San Rafael grant, they being found most everywhere. (R., 281.)

Referring to the water supply in that country in 1879, as throwing light upon the alleged dry sitios testified to by Cameron and his witnesses, witness testified (R., 282) that when he went out there in 1879

there was much more water to be found than at present, a number of springs having dried up. He gave a list of some of the springs on the east side of the river, and mentioned the fact that there was permanent water to be found in what is laid down as the home pasture on Roskruge's map, Exhibit F–52, this spring being called the Saucito (R., 288), which home pasture is within the alleged dry quarter.

On cross-examination (R., 285) witness referred to the fact that in driving cattle from San Rafael to Babacomori and Tombstone parties go through the Canelo pass, which, it will be recalled, was fixed by plaintiffs' witness Angel Elias as the north limit of this grant according to the tradition of the original settlers (R., 29, 30). Referring further to the Peñasco and the arroyo running toward it, witness testified (R., 290) that the so-called Saddle Mountain looks like a *peñasco* from the south, and that it had never been called *picacho*, but always *peñasco*, and that said arroyo running toward the Peñasco has an edge of the mesa on each side of it (R., 287–288).

J. W. Leak, sworn on behalf of the Government (R., 290), stated that he had lived as early as 1880 at the Cottonwood ranch, which, it will be recalled, is near the northwest corner of the grant; that he remembered Roskruge being there, and that the monument at the northwest corner first appeared in 1886, when Mr. Cameron "had got in a little squabble about it and thought it was Government land," and that no monument had been there previously (R. 291). Witness also testified that the old ruins of San Rafael were, according to

information which he had had since 1880, at the same place testified to by the other Government witnesses, to wit, on the west side of the river, about 3 miles below Slavens's place, and that he had heard of no other place bearing the name of old San Rafael. (R., 292.) Referring to the country in the vicinity of Harshaw, witness testified that the hills out in that place are quite red and all the soil next to the road is red; that what he had always heard called the Peñasco is on the divide between the Sonoita and San Rafael rivers at the same place testified to as Saddle Mountain. Witness gave what was probably the origin of the use of the term Saddle Mountain as applied to this elevation, as follows (R., 292–293):

> Q. Did you ever hear it (Peñasco peak) by any other name?
>
> A. I was working for Mr. Brewster Cameron. Mr. Colin Cameron was not there, and I was digging a ditch, and I noticed the Peñasco loomed up just after a rain. I says, "Look how the Peñasco looms up," and he says, "That is Saddle Mountain, that is not the Peñasco, we call that the Saddle Mountain," and I never heard it called Saddle Mountain before or since until I came here.

Joseph Campini, sworn on behalf of the Government (R., 294), testified that he had from 1881 up to four months prior to the trial lived about 9 miles east of La Zanja, on the west side of the Huachuca Mountains; that he was there engaged in ranching and cattle raising, riding the range every day; that when he first went there it was understood that old San Rafael

was located at the Enriques place, being the point about 2 miles north of the international line fixed by the other Government witnesses, his information being from the people at Santa Cruz with whom he had constant association during his residence down there; that he first knew the center point claimed by Cameron in 1880, at which time there was no pile of stones marking the monument and indeed no old rocks scattered around where the present monument now is, this monument first appearing in 1884 (R., 294–296). Witness testified to his having been up to Igo's first in April, 1880, having lived near there for six months; that he had seen the northeast corner claimed by Cameron, the first time in 1884, and the last time about six months prior to the trial, and that this monument was not there prior to 1884 (R., 296); that he had never heard of a Cerro or Sierra del Cobre at this point, the mountains near Igo's being called the Huachucas by the people of Santa Cruz and everybody; that there had never been copper found near Igo's, but on the contrary the only copper found is north of Tanners Pass, on a spur of the Huachucas near the end of the Canelo Range, and about 12 miles south of Igo's, at which point witness has a mine, and at which there is also located a spring larger than Igo's spring was when the latter went there and started improving it, and that at Igo's spring there was no *carricillo* or *tule* to be found; that witness first went to that vicinity in 1880. (R., 300, 353.) Witness further testified (R., 353) that right over his mine there is a bluff or sharp place, and that the

spring is at the mine. He exhibited to the court specimens of copper ore from his mine, and testified that a 160-pound specimen was to be found in the university in Tucson, and that his mine was about 3 miles east of Collins' old place, at which place there is a spring also. Referring to the monument at Igo's, witness testified that it was located at least 50 feet lower than the spring, and that while there were three or four stones there originally these were in connection with a mining claim held by a man named Patty. (R., 354.)

Witness further testified (R., 296) as to the monuments put up for the southeast corner, one having been put there in 1884 and the second in 1887; that these were put up by men hired by Cameron, witness supposed; that while he did not see them put up, he saw them surveying and working in that vicinity (R., 297), and also saw wagon tracks, and rocks piled up (R., 298), and the place where the stones had been taken out, 50 or 60 yards from the monument, the monuments being new (R., 352, 353). The same character of testimony was given as applicable to the east center monument, at which point (R., 357) witness testified there was nothing whatever in the shape of a monument unfil the Cameron party built it up, and that the stone transported to build this monument was more than a wagon load (R., 356).

Referring to the matter of the Peñasco and adjacent country, witness testified (R., 298) that he had known the Peñasco, or Saddle Mountain, ever since 1880, it being situated on the divide between the Santa Cruz and Sonoita rivers, and had never heard of any Peñasco

or point called Peñasco in that section of the country, except the point now named by the plaintiffs Saddle Mountain, and that this Saddle Mountain is visible from the Enriquez place (old San Rafael), and from Slaven's place (La Zanja), is very abrupt looking on the south side and has the appearance of a *peñasco.* Witness further testified to his acquaintance with the vicinity around the horse corral, and on this point testified as follows (R., 299):

Q. Do you know any arroyo north of the Santa Cruz Valley draining toward the Peñasco?

A. There is one that comes by the horse corral from Frazier's mine.

Q. How does that run with respect to the Peñasco?

A. West.

Q. Does it run up there near the Canelo hills?

A. It runs from the Canelo hills toward the Peñasco.

Q. I am inquiring about the point where this arroyo runs toward the Peñasco; is that the Santa Cruz slope or the Babacomori slope of the Canelo?

A. On the south to the Santa Cruz.

Q. Are there any mesas in the vicinity of where this arroyo runs west toward the Peñasco?

A. Yes, sir.

Q. How as to there being oak trees there?

A. Oak trees all that way across the foot of the Canelo range.

Q. Where are they with respect to these mesas running toward the Peñasco?

A. They are on it.

J. B. STEPHENSON being sworn as a witness on behalf of the Government (R., 301), testified that he had known the Igo place and spring as early as 1869; that he was with McLaughlin on his survey, and in the neighborhood of Igo's built a monument of rock 3 or 3½ feet in dimension at a point where there was no monument before that (R., 302), and that when he was on this survey with McLaughlin witness built a number of monuments under the latter's direction (R., 303).

DAVID ALLEN testified on behalf of the Government (R., 304) that he first went to the country known as Washington camp in 1878, at which time the only person living in the valley was a man named Enriquez, who was residing at the point testified to by the Government witnesses as old San Rafael, which point is about 4 miles below the Indian village claimed by plaintiffs as their center; that when witness first went there there was no monument of stone at said Indian village, but that about seven years thereafter, when Richardson and Cameron came there, a small pile of rock appeared. Witness stated that he was acquainted with A. A. Green as early as 1879, the latter having stopped with him at Washington camp in the years 1880 and 1881 (R., 305), during which time he talked with witness about the San Rafael grant, showing him where it was located. Witness testified that Green claimed his northwest corner to be about 3 miles from the Peñasco and northwest thereof, on what they called red hill, said hill not being as high as the Peñasco, and being in the vicinity of United States mineral monument No. 2, and about a

mile and a half northwest therefrom; that this red hill is a large round hill or mountain on the left of the road from Harshaw to Crittenden, and was always claimed by Green as his northwest corner (R., 306); that the Peñasco just referred to is the same point testified to by claimants' witnesses as Saddle Mountain, but that witness had never heard it called Saddle Mountain until the trial of this cause, it having been called Peñasco as early as 1878 by Enriquez, the settler above mentioned, and the people generally, and that there is no other point called Peñasco in the country (R., 307–308).

Testifying further, witness stated (R., 306) that the southwest corner of the grant, as pointed out by Mr. Green to witness, was at three little hills about a mile and a half from San Antonio Pass, being a stone monument with a black-oak stake, and that about five years afterwards Green claimed his monument to be up at the San Antonio Pass, at a pile of stones, this change of a mile and a half farther west being made, as Green stated, because these three little hills first chosen as his southwest corner would not take in Washington Camp, whereas the other place would; and after that Green always claimed as his corner this monument upon the pass. (R., 307.)

Witness testified that he was acquainted with Campini's place, in the vicinity of where the Canelo hills join the Huachuca Mountains; that there are springs there, the water from which runs down Parkers Canyon and Potrero Creek, and that witness had heard of copper being found at Tanners Pass, but never at Igo's

spring or elsewhere in the Huachuca Mountains, and that he had never heard that said mountains or any part of them were called the Sierra del Cobre (R., 308); that he first heard of copper being found at Tanners Pass in 1878, there being, according to tradition, a lost mine in that vicinity; that he had been to the monument placed a mile and a half north of Igo's, having first seen it in 1895, and that this monument did not exist in 1882. (R., 309.)

Witness further testified that Green had never stated to witness where the north center monument was, but had stated that his center monument was about 3 miles from the international line; that the only place witness had ever heard called San Rafael is a point about 4 miles south of the Indian ruins and on the west side of the river, at the Enriquez place. (R., 310.)

On cross-examination (R., 311) witness testified that he claimed to be the owner of the Pool group of mines at Washington Camp, having located them in March, 1878 (R., 315); that this group was within the San Rafael grant as claimed (R., 312); that when he first went there there were 50 or 60 mining claims at Washington Camp, and also a large number at Harshaw and Mowry camps, Harshaw having been a mining camp as early as 1877 and Mowry as early as 1861.

Being recalled (R., 328–329), Mr. Allen further described the location of the red hill, which Green had fixed as a northwest corner, as being south of west of

the Peñasco or Saddle Mountain, and that in his opinion it was not visible from right near the Canelo hills in the upper part of the Santa Cruz Valley, but that it was correctly shown on defendant's Exhibits 7 and 8, which also show Washington Camp and Lochiel. These exhibits, found opposite page 476 of the record, are instructive as showing the locality in which the Government contends was originally fixed the northwest corner of this grant.

D. G. CHALMERS, sworn on behalf of the Government (R., 316), testified that he had known the country since 1886, and that he was acquainted with the Peñasco, which is located at what claimants' witnesses call Saddle Mountain, being in appearance like a great big rock, and that this natural object can be seen 25 miles into Mexico, there being no other prominent peak or mountain that looms up like it. (R., 317.)

Witness testified as to the existence of Campini's copper mine, with a large spring there, which is located at the end of a very abrupt and wall-like spur of the Huachuca Mountains (R., 318), and to the fact that the copper mine in Tanners Pass is about 3 miles east of point C, marked on the large Roskruge map "Exhibit F–52."

Witness further testified that the monument at Igo's is lower than the spring at that point, and that old San Rafael is about 5 miles south of La Zanja. (R., 319.)

Referring to the alleged dry southwest quarter of this grant, witness testified that there is within that quarter a spring about 400 yards back of Lochiel

(R., 316), and he mentioned (R., 319–320, 321, 322), a number of other water sources which are found throughout the grant, and especially in said alleged dry southwest quarter. Witness testified as to the great value of the mines in the several camps on the grant as claimed (R., 318), in one of which he admitted he had an interest. (R., 321.)

Antonio de la Osa, sworn on behalf of the Government (R., 323), testified to his having lived at Lochiel since 1880, and to his knowledge of the Peñasco as being at the point alleged to be called Saddle Mountain, and that said Peñasco is so called by the old people of Santa Cruz, and has never been called anything else, being visible from all over the grant, and even into Mexico; that the ruins called San Rafael are situated eastward from Cameron's house, at the point where Enriquez lived when witness first went to that country (R., 324, 327), and that witness had never heard the place about one-half mile south of Slaven's called San Rafael; that witness had been frequently around Igo's place in the early days, and never saw the pile of stones claimed to be the northeast corner there until two or three years ago. (R., 328.)

Referring to the alleged dry southwest quarter, witness testified to the existence of what is known as the Saucito spring, about three-quarters of a mile west of Santa Cruz River, the water from which used to flow from the spring as far as the river, and was, when witness first went there, permanent water the year round, but that the water in that vicinity is now only about

one-half of what used to be. Witness testified also to the existence of a spring at his house in Lochiel furnishing sufficient water for irrigation (R., 325–326), and stated on cross-examination (R., 327) that he had cattle on the grant and claimed an interest in it from the Santa Cruz people.

GAVINO ARRIAGA, sworn on behalf of the Government (R., 329), testified to his being 60 years of age, and to his having lived all his life at San Lazaro, a settlement about 3 leagues from Santa Cruz and within the *ejidos* of that place; that he had an interest in the Santa Cruz grant, having helped to pay taxes on the same, both on behalf of himself and some of his neighbors (R., 330), there having been in times past a committee sent from Santa Cruz to Tucson to pay such taxes (R., 334). Witness testified to his having lived for four years at a place called Mesquite, within the grant as claimed, where he had a cattle ranch, this point being about 2 miles from the international line. Witness stated that he did not know the boundaries of the grant, and had never heard of any of them except the monument at the Potrero, presumably the south center monument; that he had never heard of the Sierra del Cobre, the mountain at Igo's having always been called the Huachucas; that he had never heard of any *Carricillo* spring in that country, at Igo's or elsewhere (R., 331), although the spring at Igo's was called *Carricito* by the people at Santa Cruz (R., 335); that he had known the Peñasco ever since he was 15 years old, it being situated on the divide between the

Sonoita and Santa Cruz valleys, and being visible from the neighborhood of Potrero Cañada and up the valley as far as Slavens's place; that it had always been so called, and witness did not know and had never heard of a point called Saddle Mountain; that witness never heard the place where the Indian ruins were located (being the point adopted by claimants as the center monument of the grant) called San Rafael; that in the early days copper was found in the Huachucas near where Campini's mine is, and from there below, at least witness was so informed by the old people when he arrived at the age of reason, but that there is no copper at Igo's or thereabout (R., 333), although copper had also been found near the Muchachita Pass, where, however, there was no mine (R., 339).

Referring to the matter of water on this grant, witness testified to the existence of the Saucito spring, containing permanent water, in what is alleged to be the dry quarter of this grant (R., 332), and to the fact that there was more water when witness first came there than now, there being then *cienegas* all around the valley (R., 334), although there are none there now (R., 338); also that the Patagonia Mountains were also called the Plomosa Mountains (R., 336), and that witness and the other owners of the grant, the people of Santa Cruz, had leased to one Samuel Hughes the ground surrounding the Hermosa mine, in what year witness did not recall. (R., 335.)

E. J. Hand, sworn on behalf of the Government (R., 339), testified to his living outside of the grant as

claimed, on the west slope of the Huachuca Mountains, at which point he had lived since 1875, engaged in mining and cattle raising. Referring to the center monument (R., 340), witness testified that he saw the monument about a mile below Slavens, first in 1884 or 1885; that it was not there previous to that time, to knowledge of witness (R., 340), and that while there might have been two or three rocks there, there was no such monument as there is now. (R., 352.)

Witness testified that the Peñasco was a well-known point (R., 341) visible from the Santa Cruz Valley and from Mexico (R., 346), and that it was the same point called by plaintiffs' witnesses Saddle Mountain (R., 341); that he had always heard it called Peñasco from the old Mexicans at Santa Cruz, there being no other Peñasco in that country, to witness's knowledge. Witness stated that he had always understood from the people at Santa Cruz that the place of San Rafael was located at the place where Enriquez lived, about 2 miles from the international line, and that he had always understood from the same source that the other ruins (at which the center monument is located by claimants) were Indian ruins. (R., 341.) Referring to the quantity of water in the country when witness first went there, he testified that there was more then than there is now, the water being then plentiful in the Santa Cruz Valley from Slavens's ranch down; and that, while there was no settlement in La Noria when witness came there, all the country had permanent water, both in and about Washington

Camp and over at Duquesne mine and inside of Cameron's pasture, on the west side of the river, where there was permanent water at the spring known as the Saucito spring. (R., 341–342.) Referring to the mesa east of the Potrero Cañada, upon which the east center monument was placed originally, witness testified (R., 343) that there are piles of stones found everywhere in that country, some on that particular mesa and some on others. This testimony throws light upon the reliability of an east-center monument fixed simply by a pile of stones on a mesa containing innumerable other piles of stones equally answering the description of the title papers. Witness further testified that Campini's mine is located at a spur of the Huachucas, the Cañada del Potnero heading about 3 miles from it; that there are at said mine three or four springs, and that copper is mined there, but never, to witness's knowledge, toward Igo's. (R., 344.) Witness testified to his having first seen a monument at the northeast corner along about 1884 or 1885, when it was new, and that prior to that time there was not, to his knowledge, any monument, although witness passed there a number of times, and thinks he would have seen it if it had been there. (R., 345.) Referring further to the topography of the country, witness stated that the spring at Igo's is higher than the monument, and that there was no carricito at Igo's when witness first knew the place, although it is a plant that grows in moist places (R., 345); also that witness knew the country around Washington camp, including the high hill there located with lime top, and that

while that hill is a very noticeable prominent object from the valley almost anywhere north, it is not the only lime hill in the Patagonias, for right west of Washington camp, where the Washington mine is, there is a lime hill that is so called (R., 346).

J. P. HOHUSEN, sworn on behalf of the Government (R., 360), testified that he had first known the San Rafael country in 1880, having lived on the old Slaven ranch in 1884, and prior to that time at Harshaw and different adjacent points in the employ of Mr. Richardson; that he held and raised cattle in his behalf, and in this capacity he rode the country every day for miles (R., 361); that what they call Old San Rafael was right adjoining the Enriquez place near the international line, and that witness never heard the place about one-half mile below Slaven's, where there are old ruins on the east side of the river, called San Rafael, and that there was no pile of stones on that mesa when witness went down there (R., 361). Witness testified to his knowing the peñasco, which is at the point marked Saddle Mountain, and is a high, steep bluff at the head of the San Rafael Valley; that witness had never heard this point called Saddle Mountain until the trial of the cause, and had never heard of any place farther north and northwest called the Peñasco.

Witness testified that he was with Mr. Richardson and Mr. Roskruge once when they made a reconnoissance or "kind of survey" of this grant on two sides of it, looking for monuments; that they looked for monuments about Mr. Igo's, but they did not find any, and

that a Mr. Trass, who was with them, living in the vicinity, pointed out down south from his place along the west side of the Huachuca Range to a prominent bluff, which he said was a corner of the grant. (R., 362–363.) Witness testified that he had heard of a corner of the grant situate perhaps 2 or 3 miles from the spring, at a point on the north end of the Huachuca Mountains (R., 364), but he understood at that time that the spring at Igo's, which was called carricito or carricillo, and more commonly Hayes, was outside of the grant (R., 364); and that in 1880 he did not understand, while in Harshaw, that the owners of the grant claimed that their grant covered the place of Harshaw (R., 363).

William M. Tipton, sworn on behalf of the Government (R., 365), testified to his having visited the grant as claimed in the capacity of special agent for the Government in April, 1899. He described the mesa taken by claimants as the center point of the grant as being characterized by the presence of broken pottery, arrowheads, and the presence of ruins which witness judged to be very old, and, based upon his experience with similar ruins in New Mexico, to be Indian ruins; this opinion being based upon the broken pottery found there and the lack of arrangement in the houses, which impressed witness as being similar to the ruins of Indian towns in New Mexico.

Witness testified that the Peñasco had been pointed out to him by Mr. Kunde and others, and that he had subsequently gone to it, and described it as having the appearance from the center of being a very large

rock, constituting the most prominent landmark on the horizon for some degrees on either side of it; that it has the appearance of a *peñasco*, as he understood the term in use among the people in New Mexico, and is the same point as Saddle Mountain on Exhibit F–52, and stands on the divide between the Sonoita and Santa Cruz rivers, the waters on the north side flowing into the Sonoita and on the east and easterly side into the Santa Cruz (R. 366–367).

Being asked as to any drainage toward the Peñasco from the direction of the Canelo hills, witness answered (R., 367):

> A. Yes, sir; there is from the direction of the Canelo hills; and not far from the top of the watershed between the Sonoita and the Santa Cruz, there is a sort of a canyon or valley-like depression south of the break toward the Sonoita that runs toward the Peñasco.
>
> Q. What distance?
>
> A. That I could not tell; I only observed it from the Peñasco; perhaps for a mile; perhaps more than that.
>
> Q. You did not go to that?
>
> A. No, sir; not at the place where it appeared to be running toward the Peñasco, but I was on the same drainage, at a point farther south than that, after it had turned south, running down toward the central part of the grant as claimed.

On cross-examination witness testified as to there being a number of peñascos in the section adjacent to the northwest corner of this grant, and that the Peñasco as designated on Roskruge's map is quite a prominent

landmark, and that the nearer you approach the top of the divide, going north, the plainer it is. (R., 368–369.)

Witness stated that he did not go to the north center of the grant as indicated on the Bonillas map, and being further asked as to the Saddle Mountain and the drainage toward the Peñasco, witness testified as follows (R., 370):

> Q. You say that from the top of the Saddle Mountain, in looking over toward the place marked "Horse corral," on the Roskruge map, that you could see a depression in the valley for about a mile?
>
> A. Yes, sir.
>
> Q. Would you call that depression an arroyo?
>
> A. It was so far away I could not state positively that it was an arroyo, but there was a well-defined drainage. There was an arroyo in that same drainage at the point where we turned off to go to Saddle Mountain.
>
> Q. Did you discover a red mountain from the point where an arroyo runs toward the Peñasco?
>
> A. Yes, sir; we went over on a point on the Canelo Hills subsequent to the time that we were up on top of Saddle Mountain, with a view to looking over that country with that very object
>
> Q. Did you find one?
>
> A. Well, there were some arroyos there for a short distance, in my opinion, running in that direction.
>
> Q. Did any of them edge on the mesa—any one of these arroyos?

A. There is a mesa on each side of the arroyo; yes, sir; that was as much on the edge of the mesa as they could be; they were at the foot of it.

Q. Did you find any oak tree on the edge of the arroyo around there?

A. There were oak brush all over that country.

Q. Did you see one with a monument around the foot of it—stones around the foot of it?

A. I did not see any such stones as I would call a monument; there were plenty of stones.

Q. Did you discover a red mountain that would answer the description of these title papers?

A. There was a red mountain or hill that could be seen from a point at the west foot of the Canelo range, between the place marked on that map "Saddle Mountain" and the point thereon marked "peñasco:" that red hill or mountain was somewhere in this vicinity, or over south, perhaps—south of the northwest corner on this map—and the point from which it could be observed I think was near where "Muchachita Pass" is written on this map in pencil.

Q. It is a very high, red mountain, is it?

A. It is a high, round hill, which appears to be high.

On redirect examination (R., 371) witness testified that this observation as to arroyos running toward the peñasco was taken in the neighborhood of the place marked "Muchachita Pass," and that the country and

mountains west of the peñasco and south of the northwest corner, as marked on the map, had red stains, and there were a number of places from a point west of Saddle Mountain up to the point designated as the northwest corner, where the mountains were red.

CHARLES A. SHIBBELL, sworn on behalf of the Government (R., 372), testified that he was recorder of the county of Pima, and that there were on record in his office, within the limits of the San Rafael de la Zanja grant, ten patented mining claims ranging in date from November 15, 1875, to April 13, 1889, and that many mining certificates and locations had been filed in his office affecting the country in the neighborhood of Mowry, Washington Camp, and Harshaw.

There was also introduced in behalf of the Government the title papers in the San Rafael del Valle and San Pedro cases, being the grants on the other side of the Huachuca Mountains, and in which these mountains are referred to as the Huachucas, thus showing that they were not in the early days commonly known as the Sierra del Cobre, as alleged by claimants (R., 497, 502).

There was also introduced as defendant's Exhibit 21 (R., 532) a letter signed J. M. M., apparently José María Mendoza, to Ramon Romero, dated January 6, 1831, from which it appears that on the date said letter was written the title had not yet been issued to the grantees, although the alleged indorsement on the expediente (R., 532) is to the effect that the title

was issued on May 19, 1825. Said letter is as follows (R., 532):

ARIZPE, *January 16, 1831.*

Mr. RAMON ROMERO:

MY DEAR AND ESTEEMED SIR: The commissariat-general of this State has entrusted to me the delivery, to the respective parties in interest, of various titles to the grant and confirmation of lands surveyed, appraised, sold, and adjudicated by the treasury of the federation prior to the classification of revenues, upon previous payment of fifty dollars in fees due on each one of them; and that of the place of San Rafael de la Zanja, which was knocked down to you and the other residents of that presidio on the 10th of January, 1822, being among said titles. I inform you, therefore, that you may be pleased to take it out of the section of the treasury under my charge as soon as possible, as is requested by your attentive, affectionate, obedient servant, who kisses your hands.

J. M. M. [Rubric.]

There was also introduced as defendant's Exhibit 22 a communication from one Pablo Frayjo to the treasurer-general, José Maria Mendoza, dated January 27, 1836, in which the writer recites the abandonment of the grant on account of the hostile Indians, and asks whether or not improvements made on the *ejidos* (commons) of the presidio of Santa Cruz would be construed as erected on the granted tracts (*sitios*). This communication appears in full on page 533 of the record. No answer to this communication accompanies it.

STATEMENT OF CLAIMANTS' REBUTTAL TESTIMONY.

WALTER E. MURPHY, sworn on behalf of the plaintiffs, testified (R., 379), that he was chief clerk in the office of the surveyor-general of Arizona, and identified a certain copy of the survey made by Solon M. Allis in 1880, which was introduced in evidence as plaintiffs' Exhibit F–74 (R., 462), and, reading from the field notes of that survey, witness showed that at a distance of about 2 leagues, or 200 cords, north of La Zanja there were noted on that survey a number of oak trees.

IGNACIO BONILLAS, recalled by plaintiffs (R., 373), testified that there was no distinction between the words *carricito* and *carricillo*, both being diminutive of *carrizo* and meaning a small cane, but witness admitted that the termination *illo* is very often a term of contempt, while *ito* is not and is purely diminutive, and that the *habitat* of the growth is warm places, and when it grows in cold places it does not attain its full growth, but remains small and slender and that is called *carricito*.

GEORGE J. ROSKRUGE, being recalled by plaintiffs (R., 377), denied that on his visit to the northeast corner he had built up the corner monument of the grant found there, or that he rode on a wagon with rocks and put them there on the monument, and stated that if any monument was built up it must have been a considerable time before he got there, as it was an old monument when he got there. Witness expressed the opinion that he got there ahead of Mr. Cameron

and Mr. Buehman on the occasion of his survey, as he was on horseback (R., 378).

Henry Buehman (R., 380), recalled on behalf of plaintiffs, testified exactly to the contrary, saying that as he recollected it they got there first and waited for Roskruge, but that the monument they found there seemed to be an old monument, and that witness did not see any monument built that day or any other day (R., 380–381).

Colin Cameron, recalled on behalf of plaintiffs, reiterated his denial that there is permanent water in the southwest quarter of the grant as surveyed by Bonillas, and stated that the water running at Washington camp and other points is there only at certain seasons; that A. A. Green had given the title to the Duquesne mine; that witness had expended in stocking and improving this range since he purchased it over $500,000; and finally that he had employed McLaughlin to survey this grant and paid him, although, as above pointed out, when first asked about this, he denied that he had ever employed McLaughlin (R., 382–383).

Concepcion Elias, recalled by plaintiffs (R., 384), testified that he had in olden times, before Igo's ranch was established, seen some small cane (carricito) growing at Igo's spring, and that there was a very well-developed road by that spring toward the San Pedro Valley in the early days, used both by the people of Santa Cruz and by the Indians. (R., 384.)

STATEMENT OF THE DECISION.

On February 10, 1900, the court, through Chief Justice Reed, handed down an opinion confirming the grant to the extent of 4 square leagues, the same to be measured in a square from the center established by the Mexican surveyor who made the original survey (R., 538–541), Justices Murray and Fuller dissenting on the ground that the grant should be rejected, it neither having been located or duly recorded, as required by the terms of the Gadsden treaty. (R., 541–542.)

The decree of confirmation was entered on February 10, 1900 (R., 536–538), covering 4 *sitios* centering at the center point adopted by Ignacio Bonillas and indicated on his plat, in evidence in this cause as plaintiffs' Exhibit F–25.

Claimants Cameron and Christie, on March 6, 1900, sued out an appeal, and on July 2, 1900, the United States likewise appealed, and the cause is before the court at the present time upon these two appeals thus sued out.

ARGUMENT ON THE FACTS.

1. The greater part of the record in this cause is taken up with the testimony as to boundaries. While it is not anticipated that it will be necessary for the court to pass upon these questions, since the decision of the case will, in all probability, turn on the questions of law, elsewhere discussed, it seems proper to at least outline briefly the contentions of the Government showing that the outboundaries of this grant are not where either Bonillas or Roskruge put them.

At the very outset, the most unusual excess within this survey arrests attention.

Four *sitios* or 16,000 acres sold; 160,000 acres surveyed. Where is the surveyor, no matter how ignorant, who does not know the difference between the two, or who, within the range of probabilities, would survey the one thinking it to be the other? The most exceptional character of this discrepancy is shown by the list introduced by Mr. Bonillas showing the grants he had surveyed for *demasias* in Mexico. In not a single one of these instances was the ratio between the *cabida legal* and the *cabida total* greater than one to four, and in most instances it was much less. Here it is one to *ten*. The very evidence of other surveys here produced shows that the attempt to stretch out this grant to 160,000 acres is unheard of in Mexican usage and would not be tolerated were this now a part of Mexico. Assuming that the Mexican officials were possessed of at least a little intelligence and at least a *modicum* of honesty—a concession that claimants seem unwilling to yield them—this attempt to prove that they surveyed 160,000 acres for 16,000 is absurd and incredible. In such a case the principles of ordinary justice and honesty, and the dictates of common sense, compel us to look further and to see if we can not find such objects as will create at least a semblance of harmony between *quantity* and boundaries. This the Government succeeded in doing by its proof on the trial of this case.

2. The Government, as will be presently considered,

has given the court a reasonable theory as to boundaries: the claimants have produced another theory. The Government's theory is nearer by 75,000 acres to the quantity granted than the claimants; which shall control? In a case of this character "where boundaries are doubtful, the quantity becomes a controlling consideration in fixing the limits."

Field v. *Columbet*, 4 Sawy., 523.
Winans v. *Cheney*, 55 Cal., 567.
Hoffman v. *City of Port Huron*, 102 Mich., 417.

The case of *Winans* v. *Cheney*, just cited, is most instructive on this point. In that case the controversy was as to whether the boundary of the tract ran along the summit of the western or eastern ridge of the mountain. Under one construction the tract would contain 1,737.13 acres; under the other, 1,067.19 acres. The deed described the land by metes and bounds with the further statement that it contained 1,056 acres more or less. Upon this state of facts the court (p. 569) held that "when boundaries are doubtful in themselves, quantity often becomes the controlling fact. It often makes the metes and bounds certain. The quantity, taking the eastern ridge as the boundary, approximates the quantity mentioned in the deed, being 11 acres more than the deed calls for. Taking the western ridge for the boundary it adds 680 acres, nearly two-thirds as much more, to the deed. * * * Such a discrepancy should not be disregarded in arriving at the proper location of the disputed boundary under the circumstances disclosed in the case."

Here, to adopt claimants' survey, will be to add not "nearly two-thirds as much more to the deed," but eight or nine times as much more to the deed.

3. The boundaries contended for by the Government in this case are the natural boundaries. It is evident that the purpose of the petition presented in 1821 was for 4 *sitios* within the valley or basin of the Santa Cruz. There was abundant water there, there was a wide expanse of pasture stretching east and west from the Huachucas to the Patagonias, which the owner of the water controlled, whether he owned the outlying lands or not. On the north was a natural barrier constituting the horizon view. Toward the northeast was the Canelo range of hills or mountains, steep and impassable save through the Canelo pass (see plaintiffs' photograph, 26), this Canelo range being the water divide between the Santa Cruz and the Babocomari; toward the northwest was a well-defined ridge hundreds of feet above the Santa Cruz Valley, constituting the watershed between that valley and the Sonoita, on the crest of which loomed up the Peñasco, mentioned in the titles. Thus, the *locus* within which this grant was sought was a magnificent and ample valley, walled in on the west and east by mountain ranges, on the north by the Canelo and Sonoita divide. It is hard to conceive of objects more appropriate for forming a natural park; and it was within these that Bustillo desired his 4 *sitios* containing the water, knowing that if he has these he controlled the rest, since, to use the language of the Ely case (p. 238), "who would

care to question the right of a locator along the waterway to any overplus of arid lands." It was this very theory of the ownership of the water, and the control, by virtue of this last fact, of the remainder that made the land so valuable in the eyes of the people of Santa Cruz and caused them to run up the bid to the unusual price developed by the papers. On the same principle that parties under our Government will spend large sums for a spring and a few acres surrounding it, not because of the intrinsic value of these taken alone, but because of the control for pasturage purposes which such ownership gives of vast arid tracts adjoining, the Santa Cruz people saw in the ownership of 4 *sitios* at the place of La Zanja the control of the great natural park inclosed by the hills and mountains just discussed. There was further the element of safety in the possession of such a tract as this: not being cut up internally by hills or mountains, every portion of it was in easy access to every other portion; there were no mountain passes to go through in order to get to a part of it, but it all lay together. In those troublous days, when Indians made raids and lurked in mountain defiles and amid the hills for purposes of murder and plunder, this was no small consideration. These people would never have thought of possessing a tract and of obligating themselves by their title to occupy it (R., 531) where occupation would entail separation from safety by high mountains, such as the Canelos, and would enable the Indians, by taking a stand at the Canelo Pass, to cut off those who had gone to

the north of the Canelos from all communication with their friends at Santa Cruz—an easy mark for massacre. The contention of claimants commits the original petitioners to all these absurdities. According to the Bonillas survey they had given to them not only the valley of the Santa Cruz, where there were 4 *sitios* six or eight times over, but a large portion of the lands in the Sonoita and Babocomari valleys—lands cut off from the main tract by almost impassable natural barriers, lands almost as foreign to the purview of the original application as is some of claimant's testimony to the truth. It is only necessary to look at the large Roskruge map used on the trial (R., 427) to see the very extraordinary character of the contention which claimants urge on this point. The fact that the grant, as carried over the mountains by the Bonillas and Roskruge surveys, includes valuable springs to the northeast and northwest affords the theory on which such surveys were directed by so far-seeing a cattleman as claimant Cameron. He needs these springs in his business for use in connection with his Sonoita and Babocomari tracts, should they ever be confirmed. This, though, is a matter of modern afterthought and enterprise. Bustillo and the Santa Cruz people no more thought of going across the Canelos or beyond the Peñasco divide to graze on their 4 *sitios* than they thought of going to Saratoga to spend the following summer.

4. Thus, the record of examination of the tract made on October 5, 1821 (see *expediente*), preparatory to ap-

praisement and sale, shows that the commissioner reconnoitered it "*with great detail in all directions*," and "found it to be an uncultivated place and the valley devoid of trees, with bottoms and benches of arid lands, because of the scarcity of *running water for irrigation*." It is hardly to be conceived that upon a reconnoissance made "with great detail in all directions" the commissioner would have overlooked the fact that the tract was cut in two by a mountain range, or that had it contained that character of topography he would have failed to notice it in connection with his mention of the valley with is bottoms and benches of arid lands. Attention is also called to the fact that the same scarcity of running water of which claimants now complain was a characteristic of the tract in 1821, thus indicating that the river even at that date was not a constant running stream.

5. The survey in 1821 shows that on a number of courses a measurement was impossible on account of the roughness of the ground. This is recited to have been true in running westward from the center, where it is said that it "was not possible to measure the remaining 67 cords on account of the roughness of the ground." On the course to the north, however, the surveyors "proceeded and measured 200 cords, terminating" at the north center monument, thus showing that they encountered no obstacles in running that line. If, however, the line was run from the center monument to a north center monument, as claimed by Cameron, it would encounter the roughest

of country, canyons, gulches, and finally the Canelo Mountains; whereas such a survey terminating at the south foot of the Canelos, as suggested by the Government, would accord entirely with the representations of the original survey. It is impossible that the surveyor of 1821 could have found that a line run up the Canelos and down again into the Babocomari Valley was a line capable of easy survey; the physical facts emphatically negative this. The only reasonable theory is that he stopped before he got to the Canelos, or, at the farthest, at the Canelos.

6. The great difference between the distance from the center to the south center monument and from the center to the north center monument on the Bonillas and Roskruge surveys arrests attention. Each of these, the surveyor of 1821 says, was 200 cords; each, he says, was actually measured. They should, allowing for slight discrepancies, be the same, or approximately the same; and yet, assuming the center to be where claimants insist it was, the distance from center to south center, scaled on the map of Bonillas, was 5.2 miles; from center to north center it was 11.68 miles, a difference of over 6 miles in the same measurement run by the same surveyor at the same time. Take, however, the north center as contended for by the Government. Taking this as being at or about the Horse Corral, it is, according to the scale of the maps, at a distance of 6.81 miles from the center monument, or very little in excess of the measurement from center to south center. This is a strong indication that the

north center is where the Government contends it to be—at the south side of the Canelo hills.

7. That the north boundary of the San Rafael de la Zanja grant was never, until the beginning of the reign of Cameron, considered to extend beyond the Canelo Hills is shown by the testimony of Angel Elias, examined for claimants in this and one or two other cases at the January (1899) term of court at Tucson. Elias testified in response to questions by Mr. Heney (R., 29, 30) that he knew how far the land of Santa Cruz extended according to the statements of the old people, and that was "*up to the place called puerto de Canelo,*" and that the boundary line of the San Rafael grant was at the "puerto de Canelo sloping toward the Babocomari." A glance at the maps in evidence will show that the *puerto de Canelo* is miles south of the north boundary claimed by Cameron and cuts the Canelo Hills from north to south, thus being on the north line as suggested by the Government.

8. The key of this survey is the location of the Peñasco, and upon it the Government is willing to rest its contention as to the boundaries of this grant. Is the Peñasco where a dozen witnesses for the Government place it, the high rocky bluff looming up as a part of the divide between the Santa Cruz and the Sonoita, visible to travelers from Santa Cruz even before they reach the international line? If so, the case for the Government is impregnable. No attempt will be made to recite again all the testimony showing that this is the Peñasco; this was one of the main issues of fact

gone into on the trial, and if the host of witnesses, among them men like Rolin R. Richardson, James Finley, and others, did not establish beyond controversy that this is the Peñasco, it is impossible to establish any fact in a court of justice by a preponderance of the evidence. As far back as Gavino Ariaga, the old witness for the Government, who has spent all his life at Santa Cruz, can recall, that rocky cliff has been known as the Peñasco. Concepcion Elias, whom claimants in the various cases in this court have been in the habit, ever since 1891, of introducing for the purpose of proving whatever could not be proved by any one else, himself admitted that the Peñasco was the first high bluff seen in coming up the Santa Cruz, and this the testimony all shows is the Peñasco contended for by the Government, that contended for by claimants not being visible at all until one gets far north of the center point. The name "Peñasco" was doubtless given by the people of the Santa Cruz, the nearest settlement, and that name would naturally be applied to the first object answering that description in going from Santa Cruz up the valley; and that the Government Peñasco does answer this description in coming from that direction is shown by the testimony of Mr. Tipton and the testimony of the other witnesses in the case (R., 248, 252, 298), even including Bonillas (R., 108). The plat of the first survey made of this grant in 1880 by Roskruge and Howe (R., 476), locates this Peñasco at the proper place, and Mr. Roskruge in his field notes of that survey (R., 472) refers to this rock

eight or ten times as the peñasco. Henry Hohusen, David Allen, Julius Kunde, J. W. Leak, P. J. Hand, D. G. Chalmers, V. H. Igo, James Finley, Campini, and Antonio de la Osa are among those who testified that Mr. Roskruge was entirely right in 1880 when he located this peñasco, and entirely wrong in 1887 when in his new survey this ceased to be the peñasco and became thenceforth, for purposes of this claim and otherwise, Saddle Mountain. Senior counsel for Cameron, in his brief filed in the court below, dismissed this great weight of testimony with the observation that there was "manifest training in the case" on that point. Counsel must be very hard to convince if the record in this case does not prove to his mind that any training in this case on this or any other point is clearly on the side of the claimants. What witnesses did claimants produce against this array of testimony as to the proper location of the peñasco? Bonillas, who lives miles away in Nogales and knows practically nothing about the nomenclature of the country except upon hearsay; Roskruge, who called this the peñasco in 1880, and in 1880 found a blazed tree, arroyo and all, at the end of 200 cords from the center for the north boundary, but who, under the hypnotizing influence of the Cameron administration, experienced a change of faith a little later, and in 1887 blossomed out as a full fledged proselyte to the belief that the peñasco was miles farther north and the north center monument beyond the Canelo hills; Concepcion Elias, who testified as to

the ancient and well-known monuments of San Rafael de la Zanja, and yet in 1880 proved his faith by his works by denouncing as public domain (and securing title thereto from the Mexican Government) a portion of these very lands that he incloses with boundaries sacred to the uses of the people of Santa Cruz; and finally Colin Cameron, the star claimant, whose ability as a monument builder is equaled only by his versatility as a witness. Such an array of talent has seldom been seen on the witness stand in any court, and such a failure to establish a substantive fact as was evidenced in the effort to move the peñasco farther north has seldom been known in a public tribunal. Counsel for claimants, however, dwell with impressive force upon the statement that the Bonillas and Roskruge surveys, although made years apart, are practically identical. Let us then see for a moment what this contention amounts to. Concepcion Elias in 1886 accompanies Roskruge as guide to the various monuments and boundaries, and Roskruge thereupon makes a survey showing the location of these monuments and boundaries and the area included within them. In order to identify Don Concepcion with this survey claimants seem to have photographed him into about half of the pictures introduced on the trial. In 1895 Bonillas comes along to locate the grant. With this same Concepcion Elias as guide to point out the same monuments and boundaries, *he* also makes a survey. Thus Concepcion guided Roskruge; Concepcion guided Bonillas. On the principle that things which

are equal to the same thing are equal to each other, it would seem that Roskruge and Bonillas being guided by the same person *should* have reached the same result, and for them to have done so, although Bonillas may never have seen Roskruge's survey, became a mere matter of mathematics. Indeed, with such ample facilities for agreeing it is remarkable that there is the amount of discrepancy that does exist between the two surveys. Thus, Roskruge's southeast corner is miles west of that selected by Bonillas, while his northwest corner is a mile or two north of Bonillas's. His north center monument is south of that chosen by Bonillas, and the exterior lines all around the tract diverge from each other in the two surveys. (Plaintiffs' Exhibit 52.) The wonder is not that these eminent inquirers after the truth coincide to such an extent, but that, with the same basis in each case, they diverge so greatly.

9. If the Peñasco is not located as claimed by the plaintiffs, but 2 or 3 miles south of it, then the north *cruz* monument of the Bonillas survey is improperly located, since it is on an arroyo which does *not* run toward the Peñasco, but toward an entirely different natural object. From Bonillas's map (Plaintiffs' Exhibit F–25) it will be seen that the arroyo runs toward what he calls the Peñasco and north of it. It does not run toward what he calls "Saddle Mountain" (the Government's *Peñasco*) (R., 225, 230, and plats), and in fact the testimony all shows that the so-called Saddle Mountain or true Peñasco is not visible at all from the Bonillas north center monument.

10. Another call in which the peñasco is mentioned is the northwest corner. The measurement from the north center monument to the northwest corner is recited as terminating "at the foot of a red hill, which is seen through an opening between the Peñasco and the Sonoita Mountain." The claimants all through the trial seem to have in mind as a northwest corner what they are pleased to term "the Red Mountain," apparently referring to a place having that name. The only drawback to this supposedly significant and impressive feature of the topography of the country is the fact that no such object is mentioned in the titles, the reference being to simply "*a* red cerro" or "hill," not "*the* red mountain." Claimants say this red mountain is seen as through a funnel from their north cruz monument, the end of the funnel being the Sonoita Mountain on one side and the Peñasco on the other. Interfering with this theory is the clear testimony to the effect that the Sonoita Mountains are not visible from claimants' north cruz monument (R., 106, 131, 163, 176), and also that the true peñasco is not visible from that point (R., 176, 223, 230, 374). As neither object is visible from the north center it is difficult to see how "a red hill or mountain" can be seen from the north center in an opening between them. To see an object in an opening between two other objects it would seem necessary to be able to see all three; otherwise relatively to the point of vision the first object is not seen in an opening between the other two. It is evident, therefore, that the Bonillas north and northwest cor-

ners do not fit the peñasco as located by the Government, and if that location be correct, the Bonillas survey can not stand.

11. Senior counsel for claimants urged in his brief in the court below that the special agents of the Government have uniformly "declined to risk their purpose for confusing the survey by looking at the impressive and convincing oak." It is assumed that "the impressive and convincing oak" referred to is the one at Bonillas's north center monument, of which one or two photographs—Concepcion Elias and all—are found in the record. It seems sufficient to say in reply that the representatives of the Government did not feel called upon to visit this "impressive and convincing oak" for the reason that it was discovered, first, that the "oak" was *not* impressive, there being thousands like it in that country, and, second, it could not be "convincing" since it was not at the edge of "an arroyo which runs toward the Peñasco," but on the contrary on an arroyo running to an entirely different object and in an entirely different direction. All interest in the oak was lost when it was discovered that its location by Bonillas on "an arroyo leading to the Peñasco" was as much a matter of fiction as was the performance of that same witness in Perrin's case in making a "mountain bearing southeast" answer the call for "a *loma* bearing northwest."

12. Is there an *arroyo* running toward the Peñasco that will answer the call of the title papers? If so, this court must accept it as the boundary call. That there

is such an *arroyo*, and, in fact, more than one such the Government contends is abundantly established by the proofs. The testimony of Mr. Cameron himself shows that such an *arroyo* drains out westward from the vicinity of the horse corral to within a mile or so of the *Peñasco* or Saddle Mountain, and then turns southward and eastward, returning to the Santa Cruz River (R., 174, 176, 177). At the request of counsel for the Government he delineated this on the large map used on the trial (plaintiffs' Exhibit No. F 52), and an inspection of that map will show that that *arroyo* runs almost directly to the Peñasco for several miles, carrying large volumes of water in the rainy season. Mr. Tipton, from the top of the Peñasco, saw this draw running directly toward the Peñasco (R., 367, 370). The testimony of Julius Kunde, a man who knows more about that country than anyone else in Arizona, is to the same effect, that there is such an *arroyo* (R., 274, 275, 287, 288), that it has a mesa on each side of it, and that there are numerous oak trees—some of them doubtless "impressive," if not "convincing"—upon these mesas, thus answering perfectly all the requirements of the *expediente* survey. Other witnesses who testified for the Government on the trial give with detail the location of this *arroyo* trending toward the Peñasco, and there is no doubt that such a natural object exists (R., 244, 267, 299). Mr. Tipton, who visited portions of the Canelo hills eastward from the horse corral, testified that *arroyos* are found there running toward the Peñasco between mesas on which there

are oaks (R., 370). If it be the duty of this court, as shown by the authorities above cited, to find and adopt as boundaries the natural objects most closely conforming to the quantity, there is abundant proof of the location of a north center monument south of the Canelo hills that this court should adopt as the proper limit of this survey in that direction. Even Mr. Roskruge had no difficulty in 1880 (R., 221) in finding "an *arroyo* running toward the Peñasco" about 5 miles north of his center point, and he found three large oak trees and a pile of stones on its south side (see the field notes of his survey of 1880, R., 475), and he had even less trouble in 1880 in finding a blazed oak on an *arroyo* in the same vicinity. See report to Surveyor General Wasson, dated September 7, 1880 (R., 468), and the map which accompanies the same. (R., 467.) While Roskruge testifies and his map indicates (R., 467) that the water in the *arroyo*, on the bank of which he found this blazed tree, runs away from the Peñasco or Saddle Mountain, or as he has it indicated on that map, "Prominent red hill" (R., 219, 467), his testimony and that map also show that the Peñasco is up toward the head of that arroyo, and it is entirely conceivable that the surveyor, standing at his north center and looking up this arroyo toward the Peñasco, might have described it as an *arroyo* "running toward the Peñasco." It is true that he could have been technically more accurate in describing it, but it doubtless never occurred to him at the time that an attempt would ever be made to carry this north boundary over the Canelos into the Babocomari Valley.

13. Coming now to the northwest corner, the testimony of David Allen, offered by the Government, is to the effect that "a red hill," which Green, in the early days, claimed was his northwest corner, is to be found near Harshaw (R., 306, 328, 329). This is indicated on the Roskruge map (Appendix III) as at the Alta millsite and United States mineral monument No. 2, and stands prominently between the Peñasco and the Plomosa Mountains. The location of the Sonoita Mountains, hills, or "*cerros*," is not very clearly defined by the evidence. Roskruge claimed that the San Cayetano Mountains were known as the Sonoita Mountains; Bonillas claimed that the natural objects referred to as the Sonoita *cerros* were the range of hills immediately at the Sonoita River, while Finley testified (R., 267) that a part of the Plomosa Mountains, being the north end of those mountains coming down to the Sonoita Creek, bore the name of the Sonoita Mountains. Upon Mr. Finley's theory—which is, to say the least, as worthy of belief as the others—the red hill, which Allen identifies, fits the *expediente* call for the northwest corner, and is, moreover, in accord with the topography of the country inclosing the Santa Cruz Valley, as above discussed, being at the west end of the Sonoita divide, on the crest of which towers the Peñasco. The testimony as to the existence of a red hill (R., 263) fitting the *expediente* and south of Bonillas's northwest corner is abundant (R., 246, 370).

14. Looking to the east of the Canelo hills for a northeast corner conforming to the *expediente*—a spring

and the point of a copper mountain—the proof is abundant that there is such a spring near Tanner's pass and thus about where the Canelos and the Huachucas come together. At this point copper ore and free copper is found in great abundance, some of it being tendered in evidence to the court with Campini's testimony. A large slab of native copper taken from this point is, the testimony shows, now in the possession of the University of Arizona at Tucson, and witness Campini has a valuable mine just there. This fulfils the call of the *expediente* for a copper mountain, and the spring at the point of this mountain, where it breaks off at or near Tanner's pass, answers the call for the spring given in the *expediente*. Claimants would have the court believe that the point of the copper mountain is at Igo's and that the Huachucas, which terminate at Igo's, were thus at the date of the grant called the "Sierra del Cobre." There is no testimony, however, that copper has ever been found at Igo's or for miles south of it, and that the Huachucas were not called the copper mountains at that date is shown by the *expedientes* of the San Rafael del Valle and San Pedro grants located on the other side of this very range, wherein this range is referred to as the Huachucas. The San Pedro survey was made in the very same year as the survey in this case and the fact that this range is called Huachucas in that document is very significant. If the northeast corner of this grant were at the point of the Huachucas, at Igo's present place, the surveyor of 1821 would have said so. By saying it was at the point of the

copper mountain he evidently referred to some part of the main range to which a special or local name was given because of the presence of copper; and the part of the range to which this name of Copper Mountain was given was not a locality, as at Igo's, where copper has never been found, but one as at or near Campini's mine, where copper has been found in great abundance (R., 244, 255, 256, 283–285, 300, 301, 308, 318, 333, 344, 345, 353), and from which it is said the church bells of Santa Cruz were themselves derived. Not only does the contention that the mountain at Tanners Pass was called Copper Mountain in the early days rest upon the fact that copper was found there, but also upon positive testimony. Thus Cameron says that Copper Mountain goes to the south end of the Huachucas (R., 184). Bonillas testified that Copper Mountain runs from Igo's southward to a low pass in the center of the Huachucas, called Tanners Pass (R., 124, 135). It is thus apparent that if Igo's was one end or point of these mountains, Tanners Pass is the other end or point; and the abrupt end of the mountain above a spring at Campini's copper mine and at that pass answers fully the call of the primitive survey. It is true that the title papers speak of the spring at the point of the Copper Mountains as being called the "Carricillo," and that there is a spring at Igo's, called the "Carricito." This resemblance of names, however, is too slender a basis upon which to hold that the two places are identical. Carrizo is a kind of cane, carricito is a small species of the same cane; carricillo is a contemptuous

diminutive of the same cane (R., 377). The name as applied to springs is referable to the fact that such canes grow in moist places and thus give their names to the springs. The same conditions for the growth of this cane exist at Campini's as at Igo's, and the testimony is that the former's spring is larger than the latter's. It is a character of growth much eaten by cattle, and the fact that no such growth is found at either place now is, therefore, not to be wondered at. We have only to suppose that such a name was applied in the early times to the spring at Campini's mine to have a northeast corner there that completely accords with the *expediente*. Further, the spring at Igo's does not fit the title papers. That spring is Carricito, the title papers say Carricillo. Counsel urge that these words mean the same thing. On the same principle Johnson spring and Jackson spring would necessarily be the same place, because Jack and John are synonymous. This matter of names, however, both as to orthography and application, is proverbially arbitrary, and the difference between the *expediente* name and the name of the Igo spring indicates clearly that they are different points.

15. We have thus a north boundary starting at the red hill at United States Mineral Monument No. 2, near Harshaw, following the Sonoita River divide eastward to the Canelo hills and to the edge of an arroyo issuing therefrom in the direction of the Peñasco near the horse corral, then following the Canelo hills to the spring at Campini's at the point of the mountain containing copper. To anyone who has seen the country

this is the natural north boundary of such a tract; to anyone who has compared the *expediente* with the country, it is impressively the north boundary which the original surveyor followed.

16. The plea of *res judicata* as to the north and northeast monuments of the grant, based on the Cameron fence case (148 U. S., 301), can not be sustained. This is not a case between the same parties. Here there are numerous codefendants with the Government who were total strangers to the former case, and if the decision of that case could be construed as binding on the United States, it certainly is not on the codefendants with the Government here, so that the case is open as to them for a full investigation on these boundaries. Further, this is not a case involving the same subject-matter. There the question to be passed upon was not whether the party owned the fee, to these monuments, but whether under the act approved February 25, 1885 (23 Stat. L., 321, c. 149), he had a claim or color of title thereto, made or acquired in good faith. There is an obvious distinction between an adjudication that the party was prosecuting a claim to these boundaries in good faith and an adjudication that he owned the fee to those boundaries, or that these were the correct boundaries at all. The court in that case held in effect that as a petition for the confirmation of this grant to the limits of the Roskruge survey had been filed before the surveyor-general under the act of July 22, 1854, and a report thereon made to Congress by the surveyor-

general, and said report had not been acted upon by Congress, and was still pending before Congress, this was in effect a claim made in good faith, and established for the purpose of the act of 1885 a "color of title." The court did not hold, however, that that claim was tenable or that the boundaries claimed were correct. It was a sufficient answer to the proceeding under that act that these boundaries were in good faith claimed; whether they were rightfully claimed was a matter reserved for some future tribunal. Neither had the court power to hold anything more in the case presented. Since the Government was not subject to suit without its consent, we must assume, in order to give this proceeding the effect contended for, that by instituting this quasi-criminal statutory proceeding it subjected itself to an adjudication of all the questions arising for all time with relation to the land upon which the fence was erected. As a matter of fact, however, the proceedings terminated when it was ascertained that a claim for the land—tenable or untenable—was being made or prosecuted in good faith by the party who erected the fence.

17. The east center monument is stated in the *expediente* to be "beyond the Potrero Cañada on a mesa contiguous thereto where a pile of stones was placed." Reference to the Bonillas and Roskruge maps will show that claimants have established their east center considerably to the north of east of the center of the grant, and in doing so have been obliged to carry their monument farther east to get it to the mesa "beyond

the Potrero Cañada." Since this mesa extends southward on the east side of the Cañada for many miles, had claimants simply run a line due east from the center, as the *expediente* states was done, they would have passed beyond the Cañada and on to the mesa just below the word "cañada" on the Roskruge map (F–52). This would have met the call in the title and would have included an area nearer the 4 *sitios* of the title. It would have run east from the center; it would have passed *beyond* the Potrero Cañada and ended upon a mesa contiguous thereto. There is absolutely no justification for the east center chosen for claimants, except the fact that a pile of rocks is found there. In view of the fact that this pile of stones was built up at a comparatively recent date, as shown by the evidence, and the further fact that there are piles of stone to be found all over that country (R., 281, 343), it is hardly believed that this court will attach any importance to it as a monument.

18. The southeast corner of the Bonillas survey is manifestly incorrect. A glance at the maps in evidence will show that there is a difference between the Roskruge and the Bonillas surveys on this point of 3 or 4 miles, Bonillas having carried his corner several miles farther east than Roskruge, and having thus included an additional strip of land on the southeast of very considerable acreage. Cameron accepted the survey of Mr. Roskruge, and in his affidavit and map presented to the Department of the Interior as the basis for excluding the area within this grant from

entry, he represented that the Roskruge survey—southeast corner and all—was a correct representation of the grant as he claimed it. This communication and map are in evidence and speak for themselves. (R., 468–476.) In addition, on the proceeding in the fence case above referred to, Mr. Cameron again tendered this Roskruge survey as a correct representation of his claim. These are the clearest of admissions as to the correctness of the location of the Roskruge southeast corner at a distance of 4 miles and 6 chains from the south center monument, and are as clear admissions of the incorrectness of the location of the Bonillas southeast corner at a distance between 7 and 8 miles from the south center monument. The latter is evidently an afterthought of claimants, born of the belief that while they were claiming they might as well claim amply, a course for which claimants are not without precedent in these Arizona land-grant claims.

In conclusion of this branch of the case the Government respectfully submits that, should it become material to consider the exterior boundaries of this tract, they should not be held to include any land north of the north boundary suggested by the Government under paragraph 15 above; that the east center should be at a point due east of the center upon first reaching the mesa east of the Cañada del Potrero, and the southeast corner should not be located farther east than the point shown by Roskruge in his survey of 1887.

BRIEF AND ARGUMENT ON THE LAW.

I.

Under the ordinance of intendants, as modified by royal cedulas of 1798 and 1805, the powers of intendants in reference to the sale of lands under article 81 were not only limited, but by the latter cedula entirely taken away and vested in the governors of the provinces; nor were intendants, under article 81, prior to its modification in 1805, given "full authority in reference to the sale of lands;" nor did they attempt to do more than to receive the petition of denouncement and carry on the proceedings until they deemed the matter ready for submission to the superior board of the treasury at the City of Mexico for determination as to whether the sale should be made.

Intendants, and subsequently governors of the provinces, were charged only with a superintendence of the incipient and mediate states of the title, but the power of completely severing the subject of the grant from other Crown lands was uniformly retained by superior authority.

In submitting this proposition, counsel beg the charitable indulgence and consideration of the court, for it appears by the opinion in the case of *Ely's Administrators* v. *United States* (171 U. S., 220) that the court must have been misled as to the position taken by the Government in that case, for it is said (225):

> What powers did the intendant possess at the time this sale is alleged to have taken place? It is conceded by the Government that by the ordinance of December 4, 1786 (at which time Mexico was a province of Spain), the in-

tendants had full authority in reference to the sale of lands.

And article 81 of that ordinance is then set out in full.

It was admitted on behalf of the Government that the proceedings for the purpose of obtaining titles to Crown lands were by article 81 required to be initiated before the intendant. His original authority, however, extended only to making up the expediente in conformity with the laws on the subject; but before any interest became vested in the applicant it was necessary for the intendant to send the expediente and his report thereon to the superior board of the treasury at the City of Mexico for its determination as to whether the sale should be carried into effect or modified in such manner as said board might direct. If the superior board of the treasury approved the proceedings, they were returned to the intendant and formal title was issued to the grantee; but, even then, before delivery it was required to be again sent to said superior board of the treasury, and, if approved, it was returned and delivered to the grantee, thus completing the grant in form and the vestiture of title in the grantee. (See Hall's Mexican Law, 40, and 2 White, 71.)

It is a notable fact, disclosed by the royal decrees from 1521 on, that no official or official body, before whom proceedings for acquiring the title to Crown lands were initiated, was ever permitted to issue and deliver final title without first submitting such action to the supervising control and receiving the concurrent

approval of some higher official or official body, and without which the grants could not be carried into effect, and such was also the policy of the law of Mexico relative to the disposition of its public domain.

It is quite interesting as well as instructive to look into the system of the tenure by which landed estates were acquired and held. The most complete and satisfactory résumé we have noted is found in Hall's Mexican Law, Chapters I–VI.

The policy of requiring the action of the officials first initiating title to be submitted for review and approval, without which the Crown was not obligated to recognize or consider the same as lawful tenure, is carried prominently through all changes of the system from the time of the conquest by Cortes to the independence of Mexico in 1821, a period of three centuries. Upon presentation of the Ely case to this court, this distinguishing feature was noted, possibly not with the clearness it should have been; but it was surely contended upon argument and in the brief that, the authority of the intendants relative to disposition of the Crown lands was limited and circumscribed by requirements which negatived the theory that "intendants had full authority in reference to the sale of lands." The supervisory control exercised by the superior board of the treasury over the action of intendants is fully evidenced, not only by the very terms of article 81, but by the royal cedula of March 23, 1798 (Reynolds's Spanish and Mexican Land Laws, p. 65), and the decree of February 14, 1805 (Ibid., 68–73). It is thus seen that in 1798 and 1805 article 81 was materially amended, but in

neither instance was the transmittal of the proceedings to the superior board of the treasury for its approval dispensed with as a condition precedent to further authority on the part of the intendant to continue the proceedings.

By the decree of 1798, the King approved the resolution of the superior board of Mexico of July 23, 1790, ratified February 24, 1792, by which those who applied for a composition or made a denouncement of the vacant Crown lands were excused from further applying to that board for a confirmation of titles, upon the payment of 2 per cent of their value in the respective offices of the auditors; when the value of the land denounced or composed did not reach the sum of $200, the proceedings were to be had in the intendancies and also in the superior board of the treasury, with the exception that the second transmittal of the proceedings for confirmation of the title and the designation of pecuniary services, as provided in article 81, was to be dispensed with. This clearly demonstrates the supervisory control of the superior board of the treasury over the action of intendants, and also demonstrates that the intendants' power ceased when the *expediente* had been made up ready for transmittal to the superior board of the treasury for its first examination in order to determine whether the matter should be carried further to the issuance of title.

The royal cedula of February 14, 1805, recites the correspondence and controversies that had arisen over the extravagant claims that were made for lands, title

to which was alleged to have originated under the intendants. In that decree it will be noted that the superior board of the treasury had decided on May 10, 1802, that the power of the intendant should be limited as to the quantity of land he was authorized to take proceedings to alienate. That power was to be confined to not more than 4 sitios for the wealthy and 2 for the poor, and the time for making settlements was to be one year. By the royal cedula of 1805 the *governors* of the internal provinces were authorized to admit denouncements indiscriminately, and to make sale of the Crown lands in their districts, provided they did not exceed the quota prescribed by the superior board under its decree of May 10, 1802.

It appears by the seventh article of the ordinance of intendants (Reynolds's Spanish and Mexican L. Laws, 59) that it was promulgated chiefly "to prevent the frequent embarrassments and conflicts that would occur between the intendants and governors, magistrates and chief alcaldes," etc.

Article 81 clearly defined the powers and duties of intendants, as separate officers, from those of political and military governors.

The complications and embarrassments which the King sought to avoid by the ordinance of intendants seem to have increased, resulting in the royal cedula of February 14, 1805 (Reynolds, 68–73). Attention of the court is respectfully directed to this cedula and the orders and reports preceding it:

Orders of Pedro de Nava, October 22, 1791 (Reynolds, 62), and January 19, 1793 (Ibid., 63).

Royal cedula, March 23, 1798 (Ibid., 65).

This cedula of February 14, 1805, was the law of Spain relative to the disposition of the Crown land in New Spain at the date of independence.

It will be noted that the governors of the internal provinces and not the intendants were "authorized to admit denouncements indiscriminately, and to make sales of Crown lands in their respective districts" under the rules established and with the provision that "they make report to the superior board for approval" (Reynolds, 74). See last paragraph royal cedula, February 14, 1805 (Reynolds, 73).

It appears that the cedula (1805) transferred the authority to receive denouncements of Crown lands in the internal provinces from the intendants to the governors of the respective districts or provinces, and that article 81 must have been abrogated thereby. The case of *United States* v. *Moore* (17 How., 209) is quite instructive upon the controversies between the military governor of Louisiana and the intendent:

> Some of the governors acted also as intendants, but that would not alter the power conferred. It was in their capacities as governor they were authorized to make grants and not as superintendents of finances (219).

The same observation is quite pertinent under the cedula of 1805.

In this instance Cordero was governor, also intendant, but nothing appears to indicate that Bustamante was performing or attempted to perform the functions

of any office except that of intendant and that only *ad interim.*

If the cedula of 1805 was in force at the date of independence, it must follow that intendants no longer had authority to receive denouncements of Crown lands, and their retention by the sovereign provisional council of government (October 5, 1821, Reynolds, 95, and January 16, 1822, Reynolds, 98) adds nothing to their authority even if it were intended to do more than retain them in the exercise of such functions only as were necessary to preserve peace and good order and carry on the government solely in such instances as did not call for the exercise of the sovereign power of the new nation.

If Bustamante, intendant *ad interim*, was also governor *ad interim*, some semblance of authority might appear authorizing him to make up the *expediente*, but in the absence of some such showing, no lawful authority for his intervention appears attached to the *expediente* immediately following Bustamente's approval of the proceedings and report. (R., 530–531.) It is to be noted that 18 per cent of the half annate tax was collected for transmittal to Spain. The same item is found in the receipt or voucher in the Ely case attached to the *expediente.*

The fact of the deposit of the money was the inducing consideration for this court to hold in the Ely case that, the commissary-general was authorized to extend the title, although no direct authority therefor was shown. It is believed that had the court's atten-

tion been specifically directed to the fact appearing in the voucher that 18 per cent had been collected for the purpose of transferring the money to Spain, it would not have held that the proceeds had gone into the public treasury of the succeeding Government. The only evidence which we have in either case that there was any money paid at all is the voucher or receipt in each case, and *if it states the truth* then the money was not in the treasury of Mexico and was not intended to go there, nor was the intendant acting for Mexico, but was attempting to dispose of the *Crown* lands for the benefit of the Crown, collecting the money for the Crown and transmitting it to Spain.

Commissary-General Riesgo does not pretend in either the Ely case or this case to extend the title by virtue of the laws of the Republic of Mexico, but by virtue of the provisions of article 81 of the ordinance of intendants and according to the instructions of October 15, 1754. Although Riesgo issued final title upon this expediente on May 15, 1825, yet we find José Maria Mendoza, on January 16, 1831 (R., 532), writing to his "esteemed friend" Romero informing him that the title to the San Rafael de la Zanja, which had been sold to him on January 10, 1822, was in his possession, and that for a fee of $50 the same would be delivered to him; and he was requested to take the same out of the treasury under his charge as soon as possible. So that it appears that José Maria Mendoza, who was a witness to Intendant Bustamente's approval and report to the superior board of the treasury, and who

was the secretary to Riesgo, the commissary-general, who failed to recite any other authority for his acts than the ordinance of intendants and the decree of 1754, was also the treasurer of the State of Sonora and had retained the expediente of the grant until January 1831, and was now demanding a $50 fee for the delivery of the same to Romero.

Whatever power the intendant may have possessed relative to the disposition of the public lands in 1821 and 1822, it was governed by the provisions of the ordinance of intendants, article 81, as modified by the royal decree of March 23, 1798, and February 14, 1805, and it is suggested that the statement in the opinion in the Ely case that "it is conceded by the Government that by the ordinance of December 4, 1786, * * * the intendants had full authority in reference to the sale of lands" was more comprehensive than the Government's brief and argument warranted; and, as has been shown in this brief as well, they did not have "full authority in reference to the sale of lands."

Of course, as to whether the ratification and approval in 1825 by Riesgo, commissary-general, operated to cure the omission of the examination, approval, and confirmation by the superior board of the treasury, *which was necessary* under the law relating to intendants, as has been shown, depends upon the power and authority conferred upon him by the laws of the Republic of Mexico. He is admittedly not so authorized in specific terms, nor does he recite any

law of Mexico justifying his act in this regard. It may well be contended that if he considered he was authorized by any specific law of the Republic of Mexico to extend this title he would have recited such a law instead of stating that his power and authority was derived from the ordinance of intendants and the royal cedula of 1754.

It has been shown that the purchase money was to be transmitted to Spain and was never intended for Mexico, and therefore no obligation was afterwards placed upon the Republic of Mexico to extend this title or to recognize the same by reason of its having received the benefit of the purchase money.

The only tenable ground upon which the action of Commissary-General Riesgo in extending this title can be sustained is that his so doing was never afterwards disavowed; and that reasoning would hardly pass legal scrutiny.

It was said by this court, in *Camou* v. *United States* (171 U. S., 277–290), that Mexico "after its separation from Spain in 1821 was asserting to act as a republic, subject to express constitutional limitations. While temporary departures are disclosed in her history, the dominant and continuous thought was of a popular government under a constitution which defined rights, duties, and powers." It was well said in the case of *United States* v. *Lee* (106 U. S., 196, 209) that the United States is a government by law and that "no man in this country is so high that he is above the law; no officer of the law may set that law at defiance

with impunity; all the officers of the Government, from the highest to the lowest, are creatures of the law and are bound by it;" and the same may be said of the Republic of Mexico from the date of its independence. If Riesgo's acts are to be tested by the principle so announced by this court, his extensions of the titles in 1825 upon all incomplete titles initiated by intendants, must be pronounced unlawful and thus within the prohibition of subsection 1 of section 13 of the act of March 3, 1891, which precludes the recognition of titles "not lawfully and regularly derived from the Government of Spain or Mexico."

II.

The petition in this case is barred by the provisions of section 12 of the act of 1891, it being shown by the proof that plaintiff Green had, at the date of filing his petition, no interest in the subject-matter of the suit, and the cross petition of Cameron and Christie not having been filed until 1899.

This proposition will be found discussed under paragraphs 66–68 of Heading V of this brief.

III.

The claim must be rejected for the reason that the grant sued for had not been located and duly recorded in the archives of Mexico prior to September 25, 1853, as required by Article VI of the Gadsden treaty.

The discussion of this obstacle to a confirmation will be found under paragraphs 50–63 of Heading V of this brief.

IV.

This grant is void as a matter of law so far as it exceeds 4 sitios, because the power to grant was limited by the cedula of February 14, 1805, to that quantity.

1. Assuming that the intendant was vested with power to make this grant, the power to grant was absolutely limited to 4 *sitios*, and therefore this grant, so far as it exceeds 4 *sitios*, is void for lack of power in the granting officers, just as it was so frequently held in California that a grant of more than 11 leagues in the Territories under the national colonization law of 1824 was *pro tanto* void.

> *United States* v. *Hartnell*, 22 How., 286.
> *Roland* v. *United States*, 7 Wall., 743, 750.
> *United States* v. *Cleveland and Colorado Cattle Company*, 33 Fed., 323.

2. Since claimants hold under a supposed power in the intendant, they hold subject to all the limitations on that power existing at the date of the grant. Among these limitations was that contained in the *cedula* of February 14, 1805 (Reynolds, p. 72), where it is expressly provided that "there should not be adjudicated or granted more than 3 or 4 *sitios* (to wealthy) and 2 to the poor." Assuming that Manuel Bustillo, the petitioner for this grant, was wealthy, and thus entitled to the maximum of 4 *sitios*, the power was to grant him this amount, and no more.

3. That the *cedula* of February 14, 1805, was in force in 1821 is shown by the petition in the San Pedro

case (*Reloj Cattle Co.* v. *United States*, No. 30, present term), dated and presented in 1821, where Perez applies for certain lands "pursuant to the provisions of the national laws and *terms of the royal cedula of February 14, 1805.*" The proceedings in the Cameron case were initiated in 1821 and were subject to the limitations of this same *cedula.*

4. That this *cedula* limited a grantee to a maximum of 4 *sitios* is shown not only by the plain wording of the *cedula* just cited, but by the reason for this limitation as stated in the cedula, as follows (Reynolds, p. 72):

> That the superior board, in view of that which had been decided, and considering that the settlement of a *sitio* of a league in extent was very difficult for a person of large means, and that lands of large area were held without this legal obligation having been fulfilled, to the prejudice of others, decided in their decree, etc.

This limitation is construed in the San Pedro title papers of 1821, where Perez, in his petition, after stating that he enjoys "some property," but is without a place upon which to locate them, prays that under the terms of the royal *cedula* of February 14, 1805, proceedings be initiated for the final sale to him of "*the 4 sitios.*" Perez had nowhere else in his petition mentioned *sitios*, so that *the 4 sitios* referred to must be those allowed by the *cedula* under which he prays for a grant, the *cedula* of 1805. Thus he himself recognized the limitation imposed by law on the granting power and invoked the grant subject to this limitation. His successors in interest at the present day are

estopped to claim more than this amount. The same is true of the Cameron grant, made in the same year, under the same *cedula*.

5. Another construction of the law as to the amount grantable is found in the *expediente* in the San Rafael de la Noria, referred to on page 93 of the report of Special Agents Tipton and Flipper, presented to this court in connection with the Ely case. In that case the proceedings were initiated on March 29, 1813, and went through various official channels until they reached the viceroy at Mexico in 1816. On November 22, 1816, the viceroy referred the *expediente* to the attorney of the royal treasury. On December 31, 1816, the attorney recommended that the *expediente* be approved for *4 sitios* instead of *5*, as the amount of land was limited to *4 sitios* for *one person*, and husband and wife were one person. This *expediente* further shows that proceedings were thereupon had to segregate the *4 sitios* from the original *5* and pay back the value of the one rejected. This proceeding is instructive not only as showing that there was a recognized limitation on the quantity grantable to any one party, but also as indicating the importance attached to this matter of quantity by the Spanish and Mexican officials. It is the controlling element of all these grants. So far from there being under the Mexican Government no grants by quantity, as argued by counsel for claimants, these Arizona grants, when tested by the laws and usages of the former government, were *all* grants by quantity. In the Cameron

and San Pedro cases the grants were certainly and necessarily by quantity, because the law limited the power to grant to that quantity.

6. While it is true that in this case the number of purchasers at the final auction was more than one, that does not affect the limitation of 4 *sitios*, just referred to. The rights of the final purchasers were limited by the rights of the original denouncer. They simply stepped into his shoes and took what he could have taken had the land on the final auction been knocked off to him instead of to them. In addition, the purchaser was really the community of Santa Cruz, a legal unit which was entitled to what one person could have gotten and no more. However this may be, the rights of the final purchasers were circumscribed by the rights of Bustillo. As was said by claimant's counsel in his brief in the court below:

> None of them [the people of Santa Cruz] could put in a separate petition for the land, because he [Bustillo] had a legal standing in court, and their only chance was to defeat *his claim*. * * * They had but one remaining chance, which was to outbid him at the final auction of the land. They combined their slender means and sent Romero to Arizpe to outbid Bustillo, if they had the money, to save this important place for the general good of the people of the pueblo.

But the "claim" of Bustillo just referred to was, as a matter of volition, as shown by his petition, and as a matter of necessity, as shown by the *cedula* of 1805,

one for 4 *sitios*. It was this claim that the community of Santa Cruz sought to defeat and finally acquired by outbidding him. The fact that a large purchase price was paid—more than sufficient, as counsel argue, to have paid the minimum government price for the whole tract within the boundaries—throws no light on the quantity that passed by the sale. The price secured must be ascribed to the warmth of the contest for the land offered; but the bids made were all with the presumed knowledge of the law which limited to 4 *sitios*, and with the actual knowledge that 4 *sitios* was all that was petitioned for and was all that was being offered for sale. No more could have passed to Bustillo or to the community unless we are to disregard the plain terms of the law.

V.

A. *The amount of land granted under the papers in this cause was the amount paid for, to wit, 4 sitios, and no more.*

1. A large portion of the argument of counsel for claimants in the court below was devoted to the proposition that the extent of any confirmation entered in this cause, should there be a confirmation, must be, not 4 *sitios*, the quantity named throughout the *expediente* and *titulo*, but the amount included within the natural objects of the primitive survey, be that amount 162,051.83 acres, as claimed on the Bonillas survey, or the considerably less amount contended for by the Government. The importance of this question seems to justify a full discussion of the subject not only as applicable

to this case but also to the other Arizona cases in which this question arises.

2. It is respectfully submitted that there has been nothing brought forth in the subsequent course of this Arizona litigation that should lead to a modification of the views expressed by the court below as long ago as March 30, 1894, when, speaking through Chief Justice Reed in the Nogales case (*Ainsa* v. *United States*, 161 U. S., 208), it was said:

> The sale occurred when the property was stricken to the petitioner and he paid the purchase price into the treasury. When he paid for the specified quantity of land which was stricken off to him at the sale and accepted a grant or conveyance of the quantity, his rights, we think, are necessarily limited to that quantity. We do not dispute the correctness of the rule laid down in the cases cited by counsel; neither are we in conflict with that rule. The rule undoubtedly is that when a conveyance is by metes and bounds, a recital as to the quantity supposed to be contained in area does not limit the grant, but the grantee takes all within the boundaries. But here the grant is of a specific quantity included within specific boundaries, and by the express language of the grant the quantity is made the controlling matter of description, and the intent of the granting officer to reserve to the Government the excess over the amount granted within the boundaries is as clearly manifested as it could have been made by a reservation in express language.

This decision, rendered over seven years ago in the first case involving these questions, is still the law of these cases, not only because of its inherent strength as embodying sound principles of law, but because it has been sanctioned by the solemn decisions of this court on appeals taken in the Ainsa and subsequent cases.

It was contended by claimant's counsel in the court below that every principle announced by this court in the Ainsa or Nogales case has been since overruled and disapproved, except one, which is as follows:

> Monuments control courses and distances and courses and distances control quantity, *but where there is uncertainty in specific description* the quantity named *may be* of decisive weight, and necessarily so *if the intention to convey only so much and no more is plain.*

While this is not conceded by the Government (as will be hereinafter more fully discussed), the principle of the opinion which counsel concede has not been overruled—to wit, that the quantity named is necessarily of decisive weight, "if the intention to convey only so much and no more is plain"—is conclusive of their case. This intention to convey the number of sitios named and no more is as dominant a feature of the title papers in every case now before this court as it was in the line of cases beginning with Ainsa's and ending with Camou's. It is the impressive fact that confronts one on reading the very caption of the *titulo*, where the number of *sitios* granted is named, and accompanies one, with ever increasing force, into the

granting clause at the end of the document, where this same salient fact of *quantity* is repeated. The framer of the *titulo* tells the reader at the very beginning of the instrument that only **4** *sitios* have been sold, he tells him so at the very end, and for the benefit of those who "would not believe though one rose from the dead," he reiterates it at close intervals throughout the whole course of the instrument.

4. An evident effort was made by counsel in the court below to escape the force of the rule above quoted from the Ainsa case by the contention that it is applicable only where "there is uncertainty in specific description," and that where there is no uncertainty, the specific descriptions, such as monuments, control, even though the "intention to convey only *so much* and no more is plain." It seems to be clear, however, that that rule applies whether the natural objects are identified with certainty or are not so identified. Since the object of the execution of all written instruments is to effectuate and perpetuate the intention of the parties, it is difficult to see why "an *intention* to convey only *so much* and no more," when "plain," should not prevail, irrespective of other considerations. The reason of the rule for giving a preference to recitals of monuments over recitals of quantity is of course the fact that such a construction is more consonant with certainty and thus with intent, but where the intent of quantity and "no more" is "plain," there is no room for construction. It is simply the duty of the court to carry the plain intention into

effect. To hold that natural objects shall prevail over quantity, when it is plain that the parties intended quantity to prevail, is to subordinate substance to a shadow, to sacrifice the evident truth to an inapplicable and technical rule of law. That this court never held any such views is shown by its language in the Ainsa case, where this rule is cited. In that case there was little if any controversy as to the exterior boundaries. There was even less in the *Ely case* (171 U. S., 220), and there was none at all in the *Maish* or *Canoa case* (171 U. S., 297); yet in each one of them this court announced and reannounced the doctrine that the number of *sitios named* was all that passed. In none of these cases was there the issue of fact or the degree of uncertainty that is present in the San Rafael de la Zanja or Cameron case. If the reason for the rule as interpreted by claimants' counsel is applicable to any Arizona case now or heretofore pending before this court, it is applicable to Cameron's. The uncertainty of the boundaries of this grant has already been discussed.

5. The contentions of counsel for claimants, as developed by their briefs below, are not entirely clear, and it is believed that they are not altogether consistent. So far as the writer can discover what is contended for, however, the positions of claimants are threefold: *First*, that the terms of these Arizona grants carry the title in fee, to the monuments, regardless of quantity; *second*, that the Sonora law of May 12, 1835, was a grant *de novo* or a revalidation to the parties of

any excess within the monuments over the quantity named; *third*, that, in either event, the claimants or their predecessors had at the date of the treaty property rights in the excess or *demasias* such as makes it incumbent on the United States to confirm them the land on the payment of the same scale of prices for the *demasias* as prevailed at the date of the original grant. These positions will be considered *seriatim*.

A.—DO THESE GRANTS EX PROPRIO VIGORE CARRY THE TITLE TO THE MONUMENTS?

6. The first of these positions—that these grants *ex proprio vigore* carry the title to the monuments independent of quantity named—is based upon the familiar principle that monuments control quantity, as a matter of description. While this rule has never been for a moment disputed by the Government throughout this litigation, its applicability to this character of title paper has been combated from the outset. It is difficult to see how this position, in view of the course of this litigation, can be insisted upon by counsel for claimants with any idea of success.

7. The instruments themselves show that quantity was in the minds of the parties to the proceeding. Quantity was petitioned for. The law contemplated a sale by *sitio*, since it fixed the price *per sitio;* the parties asked for so many *sitios*, bid for that number, that number was knocked down to them on the auction, and that number was paid for. That was all the parties to the transaction thought was being sold and that was all that was sold. The familiar principle that the

construction given the instrument by the parties to it is of very persuasive weight is of peculiar application here. This practical construction is evidenced by the testimony of Concepcion Elias, called on the trial for the claimants. Elias claimed to be descendant of one of the *parcioneros* and to be familiar with the grant, and his testimony was to the effect that he had always heard of the grant as one of 4 *sitios* (R., 208, 211). So also in the document of 1836, introduced by claimants, the parties in asking for permission to maintain their settlement on the *ejidos* of Santa Cruz, and to have such settlement considered as on the lands of San Rafael de la Zanja, refer to the latter as the "*sitios*" granted them (R., 533).

8. It was contended, however, in the court below that the term *sitio* has no technical meaning, and that when used in these venerable deeds means simply a tract of land, the extent of which is to be determined by the rest of the instrument. It is not believed that a shadow of foundation can be found in the books for this assumption. The term "sitio" when used alone means a square of 5,000 varas, or 100 cords, on a side. It is equivalent to a "sitio de ganado mayor," which thus has an area of 25,000,000 square varas. When an area of less than 25,000,000 square varas is intended, the term "sitio" or "sitio de ganado mayor" is never used, but some qualifying term or expression goes with the word sitio. Thus, a "sitio de ganado menor" has an area of 11,111.111⅑ square varas. "Sitio" standing alone, however, has a well-defined meaning and a well-fixed area, and that is the area and the meaning above

given. There are a large number of laws declaring the extent of the sitio, a few of which will suffice to illustrate the uniform definition given the word as a technical unit of measurement. Thus, article 5 of the law of January 4, 1823 (Code of Colonization, p. 172), is as follows:

> ART. 5. The measurements of lands shall be as follows:
>
> Supposing the varas for measuring to be 3 geometrical feet, a straight line of 5,000 varas shall make a league; a square which, on each side has 1 league, shall be called a *sitio*, and this shall be the unit for counting 1, 2, or more *sitios*.

The law of January 25, 1825, of the State of Jalisco (Code of Colonization, p. 197) further illustrates this as follows:

> Second. They [lands] shall be divided into *sitios* and farms. Sitios shall contain a league in a square of 5,000 varas, or what is the same thing, 25,000,000 square varas.

So also the law of December 15, 1826, of the State of Tamaulipas (Code of Colonization, p. 214), which is as follows:

> ART. 14. A square of land which on each side has a league, or, which is the same thing, an area of 25,000,000 square varas, shall be called a *sitio*, and this shall be the unit for counting 1, 2, or more sitios.

To the same effect (Code of Colonization, p. 259), is as follows:

ART. 13. For the survey of lands a vara of 3 geometrical feet shall be used. The farm shall be a square that has 1,000 varas on each side, and the *sitio* another square with 5,000 varas also on each side.

A contemporaneous construction of the meaning of *sitio* is found in the Nogales or Ainsa *expediente*, dated in 1841. That grant, like Cameron's, which was for the raising of cattle, is described as being composed of "sitios for raising cattle and horses," so that the meaning of *sitio* as there used will be strongly persuasive of what is meant in this case. In the Ainsa case we have a construction of this matter, not by a subordinate official, but by the treasurer-general himself, by José Maria Mendoza, the very same officer whose name appears so frequently in the *expediente* and *titulo* forming the basis of this claim. Let us see what Treasurer-General Mendoza thought of the word "sitio" and its meaning:

On May 26, 1841, Mendoza, then bearing the title of superior chief of the treasury, issued an order for a survey of the vacant public land adjacent to the lands of Casita and also for a survey of the *demasias* of said ranch, this proceeding being preparatory to a sale of the same to certain parties who had filed an application therefor. In issuing this order Mendoza gives certain directions as to how the *sitios* are to be measured. These are in part as follows:

He * * * shall adjust the *sitio* or *sitios* contained in said lands of Casita, their overplus, if any there be, and the vacant public

> lands already mentioned, strictly by said regulations and the *inveterate* and *constant* rule of multiplying the number of varas contained in the diameter from north to south by that of those contained in that from east to west, to give to each *sitio* the area that corresponds to it, of *25,000,000 square varas.*

The report of the survey in that case shows that this "inveterate and constant rule" was strictly followed, with the result that there resulted within the ranch of La Casita "*the same nine sitios* the original surveyor, José Olare, measured and estimated on the 28th day of April, 1742, and 9,200,000 square varas more, *which do not make half a sitio.*" As to the survey of the public lands the report was "that they contained 340 cords from north to south, and 222 from east to west, which, reduced to varas and multiplied one by the other, give an area of 188,700,000 square varas, that make 7½ *sitios* and 2 caballerias, a little short, for raising cattle."

Reducing their theory to practice, it was urged by claimants on the trial that, considering the grant as one of 4 *sitios*, such *sitios* should be considered as the 4 segments into which the tract within the monuments would be subdivided by lines running through the center and connecting the side-line monuments; in other words, that 4 *sitios* should be adjudged by this court to be 150,000 acres, and 1 *sitio* to be one-fourth thereof, i. e., 37,500 acres or thereabouts. The "inveterate and constant rule" above set forth, however, makes a sitio 25,000,000 square varas or 4,338 acres. It is not believed that the ability or ingenuity of counsel can

induce this court to increase a *sitio* eightfold from the extent as observed when José Olare made his Casita survey in April, 1742; an extent observed from 1742 to the Mexican independence, and declared by the officers of Sonora to be the inveterate—*inveterada*, "rooted"—and constant rule for laying off a *sitio*. It is the duty of this court to give claimants only what they would have gotten under the Mexican Government, and stop there. As was said in the Supreme Court in *Ely's case* (171 U. S., 239):

> No duty rests on this Government to recognize the validity of a grant to any area of greater extent than was recognized by the Government of Mexico.

This rule applies as much to the question of the extent of the Mexican *sitio* as it does to the broader question of area, to which it specially refers in the opinion just quoted from.

9. As little worthy of serious notice is the contention urged by claimants in the court below that this grant carried at least 16 *sitios*, based on the fact that there were 200 cordels measured to each cardinal point from the center. Since the title papers distinctly show that only *4 sitios* were petitioned for, offered for sale and paid for, and since, as above seen, the extent of a *sitio* is well fixed under the Mexican law, it is arguing against the clearest and most conclusive proof to the contrary to urge that 4 *sitios* means 16, and that each *sitio* was, as a matter of fact, 4. The explanation of the discrepancy lies in the very evident fact that the surveyor by

mistake laid off 16 *sitios* instead of 4. Instead of running 100 cordels on each course from the center he ran 200 cordels, thinking thereby that he was laying off 4 *sitios*, when in fact he was laying off 16. His error seems to have been overlooked by the officers to whom his field work was returned, but when title or patent was issued it was for 4 sitios and not for 16; and it is the title or patent which fixes the rights. As was said by the court below in the Ainsa or Nogales case:

> The patent or grant is the evidence of his title—that is, it operated to convey to him the only right which he acquired in the property under the proceedings * * * It seems to us impossible that his rights could be enlarged beyond the express terms of the sale and grant by the proceedings which preceded the sale. Those proceedings were essential, perhaps, under the law. They do not, however, constitute the sale and were merely preliminary to it.

The intent and purpose of the granting officers were to convey 4 *sitios*, not 16. They showed this by offering for sale only 4 *sitios* and demanding pay for only 4 *sitios*. The intent and purpose of the grantee was to acquire title to 4 *sitios*, not 16; otherwise he committed a fraud on the Government in not paying for 16, since he knew that under the law each *sitio* had a specific value and must be paid for. As one of claimant's counsel very properly conceded in his brief: "We frankly admit that the bidder '*supposed*' that the total quantity of land contained within those boundaries was only 4 *sitios*." The granting officials certainly sup

posed the same thing. We have thus the theory upon which the parties acted, their intention governing the transaction. What is the duty of the Government therefore? To effectuate that intention or to ignore it? Certainly, there can be but one answer to that question, and that is that this Government, to quote again from *Ely's Case* (171 U. S., 240), is under no moral or legal obligation to consider as granted any excess over the actual area mentioned, but may "justly and equitably treat the grant as limited to the area purchased and paid for." It is certain that the Mexican Government would never have treated this as a grant for 16 *sitios* when only 4 were paid for. An illustration of its attitude toward excessive measurements is given in the San Pedro case (*Reloj Cattle Company* v. *United States*, No. 30, present term). There the grant is measured not from a center but from an exterior corner, the evident attempt being to measure off a square, the sides of which are given as 250 cordels each. This makes an area of 6¼ *sitios* within the measurements, although the title papers call for a grant of only 4 *sitios*. According to counsel's contention this is a good grant for at least 6¼ *sitios* on the theory that the 4 *sitios* as defined by the survey are not 4 *sitios*, but 6¼. It happens, however, that the Mexican Government in *1880–1888* acted upon this grant (see Government's Exhibit 5 in the San Pedro case) and laid off on petition of the parties at interest the extent of their *cabida legal*, and this as recognized by the Government is not 6¼ *sitios*, but 4 *sitios*, thus showing that

the Mexican Government in passing on these documents for the purpose of determining how much they convey disregards a plainly erroneous calculation and recognizes only what the parties "supposed" they were receiving and what as a matter of fact they did receive. From all this it is plain that a *sitio* is still a *sitio* as it was in 1742. It is no reflection on the eminent ability of claimants' counsel that they are unable to make it more.

10. With this digression for the purpose of considering the contentions urged as to the size of a *sitio*, we come back to the question of how much passed by the terms of the grant. The instruments themselves and the practical construction given them by the parties have just been considered, and it has been urged on behalf of the Government that they convey only the quantity named and no more. Let us see what authority we have for this construction. Obviously the two highest sources of authority to which we can look for a construction of these documents are the two nations which have had to deal with this character of instrument, Mexico and the United States. In the United States, certainly, we can find no higher construction than that given in this court, and in Mexico none more reliable than that given by its highest public officials. Let us look to these two sources of information.

11. If any question has ever been settled by this court, it is the proposition that the character of title document here presented conveys only the quantity

named. It seems unnecessary to do more here than simply to cite the following cases:

Ainsa v. *United States*, 161 U. S., 208.
Ely's Administrator v. *United States*, 171 U. S., 220.
United States v. *Maish*, 171 U. S., 277.
Perrin v. *United States*, 171 U. S., 292.

The Maish case is especially in point, since in that case there was absolutely nothing causing a reversal by this court but the clean-cut question of quantity; and that question was decided as here contended for by the United States.

12. It is claimed, however, that there were brought to light on the trial of this case below additional facts and arguments which were not before this court on the argument of the cases above cited; and that this court should therefore not feel called upon to follow those decisions. It is urged, for instance, that at the time the Ely and other cases were under advisement by this court it was without the benefit of Mr. Bonillas's testimony as to the customary presence within the monuments of Mexican grants of an excess over the area actually sold, a subject, which it is urged, has been gone into very fully by Bonillas on the recent hearings. Counsel for the Government do not share in the belief that the amount of erudition injected by Mr. Bonillas into the record just made up is sufficient to cause the wheels of jurisprudence to turn backward and this court to reverse itself in at least four of its decisions. The suggestion made by claimants' counsel as to the radical influence which

the testimony of this witness will have in causing this court to change its views is, it is believed, born of an exaggerated notion as to the importance of Bonillas's theories on questions of law and of fact. Whatever may be the skill of Mr. Bonillas as a monument finder and an identifier of boundary calls at places not hinted at in the *expediente*—peculiar qualities which have appeared in a number of these Arizona records—it is not believed that had every syllable which he has injected into the present record been before this court in the other cases, it would have made a particle of difference in the result, would have caused it a moment's additional hesitation in deciding those cases, or would have swayed it a hair's breadth from the conclusions announced in them. This for the double reason that nothing Mr. Bonillas has of late testified to has been instrinsically startling, and for the further reason that everything material as to which he gave testimony at the trial of this cause was before this court in the spring of 1898, when the Ely and other cases were decided. The principal additional light Bonillas is supposed to have thrown upon the record is the fact that in all or almost all of these Mexican grants there is a considerable excess, within the monuments, over and above lands paid for. This, however, is no novel proposition; it is new neither to the court below nor to this court. Mr. Bonillas testified to the same facts in the *Faxon case* (171 U. S., 244), argued along with the other cases, so that these facts, in so far as they are material, were fully within the

knowledge of this court at the date of those decisions and long prior thereto. Indeed the Nogales or Ainsa decision is based upon the very matter of excess; that claim is founded in part upon the denouncement of *demasias* or excess; and section two of the law of May 12, 1835, which is set out in full in the Ainsa decision, expressly recognizes the fact that there is to be found a surplus or excess in many of the grants issued by the State of Sonora and makes provisions whereby parties may secure title thereto. Thus, there was before this court in the Ainsa case all that Mr. Bonillas has lately testified to. In addition, Mr. Bonillas's Faxon testimony was referred to and quoted by Mr. Ford in his brief in Ely's case (p. 7), so was before this court when that case was decided; and in Mr. Ford's additional brief in the same case (p. 8) there is quoted the Mendoza letter of 1829 (Tipton-Flipper report, p. 84), wherein the great excesses of area within monuments, over area purchased, was fully discussed. To any one who will take the trouble to read the briefs in this court in the cases above referred to, it will be readily seen that all that Mr. Bonillas's testimony in the case tends to establish was before this court as an admitted or fully established historical fact in the other cases. To say that the solemn decisions of this court in at least four cases shall be disregarded because, forsooth, it has just come to light that the Alamo de Sevilla and a dozen or so other grants in Mexico have excessive areas within their surveys, is to ask this court to ignore the rule of *stare decisis* and

to say that its decisions, however solemnly pronounced, conclude nothing.

13. It was further argued in the court below that the proceedings under Mexico leading up to the issuance of patent constitute a judicial determination of the location and extent of the several grants, and is "entitled to the credit that is given to the decision of a court as to all legal presumptions in favor of its regularity and conclusiveness." This contention seems to be based upon the rather elaborate proceedings provided for in the Sonora law of May 20, 1825. As the San Rafael de la Zanja titulo is dated May 15, 1825, it is clear that the Sonora law just cited and the argument based upon it are inapplicable. But even if this argument as to a judicial determination of the question of boundaries, etc., by the Mexican Government were one not urged by claimants on the appeal in the Ely and other cases, it would still not justify this court in disregarding that decision. While new facts may change the complexion of a cause on second appeal, new or ingenious arguments, which might have been urged on the former record, will not justify a modification of a former decision. (*Ellis* v. *State Ins. Co.*, 68 Ia., 578.)

However, this argument was urged on the appeal in at least one of the cases above cited, that of Perrin, and whatever force it had was undoubtedly considered by this court in the decision in that and the other cases then decided. At pages 51, 53, 55, and 57 of the brief filed by Mr. Morgan in that case this same argu-

ment appears, clothed in the force and plausibility which characterize all of that gentleman's utterances, and yet despite this argument the Supreme Court held that Perrin should have only his 8 *sitios* and Ely's administrator only his $1\frac{3}{4}$ *sitios*. Certainly this court is not called upon to do more for Cameron than it felt called upon to do upon the same character of *expediente* and upon the same argument for Perrin, Maish, and the Ely estate. The decisions above cited are conclusive upon this question as they are upon most of the other contentions raised by claimants. Were the matter one for original discussion, however, it is not believed that there are grave difficulties either upon principle or upon authority in establishing that the officials charged with administering the law passed upon no questions except those purely incidental to the issuance of the title for the number of *sitios* named. They were not judicial officers (*Ainsa case*, 161 U. S., 233), and decided nothing in any of these cases that can be distorted into an adjudication that the title to the whole tract within the monuments passed, or that the title to anything passed, except to the number of *sitios* paid for.

14. It is further contended by claimants that the expression alleged to be found in this *titulo*, "appurtenances, metes, and *boundaries*," distinguish this case from those passed upon heretofore by this court. It seems sufficient to say that these words are apparently not found in the San Rafael de la Zanja title; but even if they were, they are also found in the Ely, Maish, and Perrin title papers, and were discussed before this

court in connection with those cases. (See claimants brief in Ely case, p. 122; same in Maish case, p. 50; same in Perrin case, p. 53.) The argument here presented, then, is nothing novel, and it is distinctly foreclosed by the decisions of this court.

15. It was also urged that all doubt as to "the intention to cede all the land within the designated boundaries" is removed by "juridical possession delivered to the grantees;" and to sustain this view the well-known line of California cases as to the force and efficiency of delivery of juridical possession as a judicial determination of boundaries is discussed. It is sufficient to say as to this that the same argument was pressed before this court in the Ainsa case. (Mr. Ford's brief, pp. 4–12.) The opinion of this court upon this very point is found in 161 U. S., 240. In this respect the Ainsa case has never been overruled, but has been steadily adhered to in all the cases since determined.

16. It is further urged that this grant should be held good to the extent of the survey, because it has been occupied to the outboundaries, and on the further ground of a prescriptive title flowing from such possession. The same view was urged in Ely's case, and was promptly disposed of by this court (171 U. S., 238), where it is said:

> So the silence and inaction of the Government and third parties are not strange, and create no presumption in favor of the validity of the grant to the extent of the survey.

17. From a careful consideration of these Supreme Court cases, therefore, it must be conceded that the

main question of quantity has been already settled, so far as it is possible for a court of last resort to settle any question; and that in rendering those decisions this court has given due weight and consideration to every argument advanced on the trial of the present case. Having considered, therefore, how the courts of this country have construed the character of grant document here presented, let us turn now to the practical construction given them by the officials and laws of Mexico.

18. It was the policy of Spain for at least from 1700 to 1821 to pronounce condemnation upon those who possessed large areas of lands in excess of their titles, and the royal decrees all provide for a revision of titles, and the failure to present them for revision (composition) operated as an abandonment and an equivalent to formal denouncement. (See Hall's Mexican Law, Ch. IV, and cedula of 1754, ibid., Ch. V.) The laws of Mexico and the State of Sonora relative to *demasias* proceed upon the same theory, that possessors of excess over their lawful titles were detainers without title as to the excess, and recognized no obstacle, either moral or legal, to the exercise of the *jus disponendi* by those governments.

19. The very first law which claimants' counsel invoke in support of one of their contentions—the State law of May 12, 1835—shows that these grants *ex proprio vigore* carry nothing more than the quantity named. This law provides that parties who, under the boundaries set out in their proceedings of survey,

occupy any surplus lands become entitled thereto "without other obligation than to pay for the excess," etc., and provides that the land shall be adjudicated to whoever denounces or applies for it "only in case the holder does not need the surplus or when the latter is very excessive in the opinion of the Government based on the report of the Treasury." But if the holders of these grants had by virtue of their language title to the whole, what was the purpose of providing a system by which they might become entitled to the excess? If they owned the whole, where was any excess? If they owned the whole, what right had the State of Sonora to provide conditions on which they might acquire a portion? Or what right did the State have to say that others should have the surplus in case the owner did not need it? Or to say that others should have the surplus in case the latter were excessive? Why all this talk and all this litigation about surplus, excess, *demasias*, if the owner held title in fee to all? Surplus, excess, *demasias* of what? Evidently of something which the owner held. But if he held the whole, where was the excess, the surplus, the *demasias?* Suppose, however, we assume, as this court has decided, that the amount granted was the quantity named, we then have in the case of surveys inaccurately made a surplus or excess, title to which the State of Sonora by this law of 1835 says can be acquired by performing certain things. This construction makes the law of 1835 intelligible and significant; the other makes it a mere play upon words and worse than senseless.

20. The letter of February 23, 1839, signed by José Maria Mendoza (Tipton-Flipper Report, p. 84), is also significant. Mendoza was at the time superior chief of the treasury, and this communication was addressed to no less functionary than the secretary of state and of the department of the treasury, at the City of Mexico. Certainly, this is on its face a valuable source of construction for a grant made about that time; and yet we find Mendoza there referring to the "large number of grantors who appropriate considerable *excess* of *sitios* which are wanted by breeders, who need them, and defended by those who are in possession of them, and *said excess* arising from the fact that ancient surveyors, from ignorance or bad faith, *to measure two sitios measured four and to measure that number measured eight or more sitios*," etc. On page 87, also, he refers to "resurveys of certain portions applied for to determine their *excess*." To quote these extracts from official correspondence is all that is necessary to show that under the Mexican system there was no grant or title to outmonuments, natural or artificial, but simply for a certain quantity, resulting in the "considerable excess." If, where surveyors ran off 4 *sitios* for 2 and 8 for 4, title passed to 4 in one instance and 8 in the other—the precise argument made by counsel in this case—it is difficult to know why the superior chief of the treasury would have been worried about the matter or why he would have made it a subject of official communication with the secretary of state of the Republic. If the whole was private property, his letter would have been

the veriest folly, for there would have been no "excess" to write about, much less to "ascertain by resurveys," and the land being the property of the individual would not in the least have concerned the State on a question of revenue or otherwise.

The Nogales *expediente* (*Ainsa* v. *United States*, 161 U. S., 208) is also most interesting on this question. There, the court will recall, was a proceeding instituted in 1841 to denounce *demasias* within a ranch granted in 1742. If the views of prescription urged by counsel here as applicable to a grant of 1821 or 1831 have any force, they would certainly have had force as to a grant a hundred years old in 1742. If the grant here claimed was good to outboundaries, certainly the Casita grant, dignified by a century's possession, was good to the outboundaries; and yet we find the owners of that ranch not relying on prescription, not claiming that their grant included all the land within the monuments, not calmly awaiting the action of the Government to ascertain an excess over their 9 *sitios* and thereupon unwillingly paying the amount found due into the treasury, all of which counsel urges that they were privileged to do. But what? An application filed by them, not by the Government, asking a resurvey, an offer to pay for the excess and a *request for a título* for the excess. But why a resurvey if they owned all, and had ever since 1742? Why an offer to pay, if they had in 1742 paid for all by paying for 9 *sitios*? Why a desire for a *título* to the excess if they had a title already good for every foot within the monuments? To ask these questions is to

answer them. They owned 9 *sitios* and *no more;* hence they took the only method of securing title to the balance, and that was by appropriate petition, resurvey, payment, as in the case of the original grant.

22. It was urged by claimants on the argument, however, that if parties were always subject to having their lands surveyed and payment enforced for a proportionate balance of the purchase money, there would never be an end to the proceeding; that if the first survey was erroneous the resurvey might be erroneous and a resurvey of the resurvey might be, and so on *ad infinitum.* The Sonora government guarded against this very contingency, however, in its provision of the law of 1835, to the effect that "in lands measured by estimation, excess or deficiencies shall not be so considered when they do not exceed half a sitio." In this very Ainsa case the excess proved to be less than half a *sitio* and was disregarded.

It is altogether beyond the range of probabilities to assume that a second survey of a tract would ordinarily or frequently leave an excess of more than half a *sitio,* so that counsel's difficulty exists more in the imagination than as an actuality. Should such a case arise in the future, however, there is no doubt that the Mexican Government would permit an unlimited number of successive surveys as long as the excess remained above a half *sitio.* Indeed, in some grants situated within the Republic, there have been instances where several successive resurveys have been necessary before the requisite minimum of *demasias* was reached.

23. The Ainsa expediente is most instructive on another point, and that is as to the degree of importance attached by the Mexican officials to *quantity*. From the argument of counsel for claimants one should suppose that the former Government was entirely careless of its lands; that it was so anxious to get this public domain off its hands as to force it on its people *nolens volens*, or to give it away for the asking, without money and without price. They would have us believe that the former Government would ignore, as too insignificant to take thought of, a slight discrepancy of 100,000 acres as in the Babocomari claim, or 130,000 acres as in the Agua Prieta, or the petty excess of 140,000 acres in the San Rafael de la Zanja; but what was true as a matter of fact? In the Ainsa claim the surveyors, according to their field notes, included a tract 340 cordels from north to south and 222 from east to west, which they reported to "include 7½ sitios." Upon multiplying these figures out, however, the area was found to be 188,700,000 square varas, or 211 acres in excess of the amount stated. The Mexican officials, however, did not ignore or overlook this; they did not take the view that the land was valueless and that it was to the advantage of the nation to have it occupied without payment on the part of the occupant; on the contrary, they recalled that the necessities of the Government demanded revenue, and that its laws throughout were primarily for the purpose of raising funds and not for colonization. They accordingly charge up these 211 acres, or "2 *caballerias*, a little

short," as they are called, to the denouncers, who, upon paying the equivalent reals and grains therefor, secured title to their *caballerias.* Can anyone who scans this transaction believe that these officials intended to sell 16 *sitios* for the price of 4, or 160,000 acres for the price of 4, in the San Rafael de la Zanja proceedings? Or that they intended to give title to Perrin's predecessors in interest for 130,000 acres for the price of 8 *sitios?* This is as incredible as is the idea that the parties who purchased considered they were entitled to an acre more than the quantity paid for.

24. Another construction of this question of extent is found in the Rancho de Bacatete. (Tipton-Flipper Report, p. 91.) In that case the proceedings begin February 14, 1842, with petition of José Maria Duarte to the departmental treasurer, and states that the original *expediente* had been sent to Mexico and lost. He petitioned for resurvey and issue of title. This was granted, but the resurvey showed more land than had been paid for in 1812, and the *claimant was ordered to pay for the excess.* Other instances of denouncements and *demasias* given in that report are case 128, pages 74–75, and case 135, page 79; in each of these instances the proceedings for a resurvey and for title to the *demasias* being initiated by claimants and not by the Government.

25. The very expression "*cabida legal*" (legal area), as applied to the quantity purchased, as distinguished from the amount within monuments, is significant. In the Ainsa case this is expressed in another form where

the direction is given for the surveyor to proceed "to the exact and scrupulous resurvey of said lands, giving them the area or number of *sitios that legally belong to them*, with due *separation* of the *sitio* or *sitios* that result in excess within the lawful boundaries of said lands of Casita." Certainly claimants can not with justice claim more than the number of *sitios* paid for, that being, under the Mexican construction of 1842, all that "legally belongs to them."

26. Mr. Bonillas, in his testimony (R., 234), stated that he had found in the archives at Hermosillo, Mexico, an *expediente* of the resurvey of the Chupisonora grant, wherein the state surveyor says:

> Article 4 of law number 197 of the 14th of May, of the present year (1852), leaves the selection of the land to their titles to the possessors. When he was going to locate the *cabida legal* of the grant he states this and summons the owners so that they will make the selection.

Since the trial of the cause representatives of the Government have secured from Hermosillo a copy of this law, and a translation thereof is attached to this brief as Appendix 2. From section 2 of that law it will be noted that *demasias* are considered to be "those that may be found within the true outboundaries of the grant titles," and "they shall be excessive when they amount to the third part of the land which said titles may contain." It is further provided (section 3) that when the said *demasias* are *not* excessive the possessors may apply for them with proof of having sufficient means for stocking them, and in that event they

shall be adjudicated to them without public auction at the rates then (1852) in force. If the possessors do not want them they are to be adjudicated to denouncers on like terms, but should the *demasias* be excessive, then they shall be sold to the highest bidder.

If claimants are correct, then, although the original grantee owned all the land, the Government by this beneficent law gave him the privilege of buying a part of what he already owned, if he wanted to do so. If not, then someone else might buy it, not from him, "the owner," but from the Government. Further, that although the grantee owned all the land, if he wanted to buy a part of it he must pay the price prevailing, not at the date of the grant, but in 1852, and even his right to buy some of his own land was limited, since if the *demasias* were excessive or more than one-third of the legal area, he had no prior right to purchase at all, but the land must be sold at public auction to the highest bidder. This was a truly wonderful system, indeed, if claimants' theory as to the status of the title to the land within the boundaries is to be indulged; and the beauty of this theory becomes even more apparent when we consider section 4 of the law, which provides that the possessors within the general area are allowed to select the principal land (the cabida legal) that may best suit them, provided they leave the *demasias* regularly united in one body in order that the treasury may alienate them to advantage. This indicates as clearly as human language can indicate, that in 1852 the title to the whole tract was not vested in the grantee, but

only that quantity for which he had paid, the rest being reserved in order that the treasury might alienate it to advantage, and that the Government gave him a right to locate his *sitios* anywhere within the boundaries, extending the right because the land within the boundaries was the Government's, not his. Many absurd things have been attributed to the Mexican officials in the course of this litigation, but it is not believed that anyone would impute to either the nation of Mexico or its subdivisions the extreme absurdity of proceeding to allow a grantee to locate his *sitios* anywhere within *his own lands*. Such generosity is beyond human comprehension, and yet the argument of counsel for claimants is in effect that the grantee owned the whole tract, and at the same time the Government gave him a right to locate a fixed quantity anywhere within what he already owned.

27. The course of the Mexican Government from 1853 to the present time shows that the only title held by the grantees is the title to the actual number of *sitios*. Thus the law of July 22, 1863 (Hall, p. 173), provides how parties in possession may obtain title to the lands they occupy. The provisions of this law cover possession of lands whether held as *demasias* or as lands without grant at all. They are broad enough to include both, and in contemplation of this law both seem to be on the same basis. In either instance, whether land be held by mere squatters' right or claimed as a part of a grant in excess of the *cabida legal*, denouncement is made, survey follows, the purchase

price is paid, and the denouncer gets title. In several of the Arizona grants recently tried by the court below proceedings of denouncement of the *demasias* were had in Mexico under this law. Thus, in the Agua Prieta case (*Ainsa* v. *United States*, No. 35, this term, R., 215), *demasias* were denounced by the owners of the legal area in 1880, and after full proceedings title was issued upon payment of the tariff rate for the current year. So in the San Pedro case (*Reloj Cattle Company* v. *United States*, No. 30, this term, p. 255), where the *cabida legal* of 4 *sitios* was laid off and payment accepted and the title issued for the balance. In the Buena Vista case (*Maish* v. *United States*, No. 268, October term, 1900), also, the *cabida legal* was laid off and title to the *demasias* granted by the Mexican authorities to the three denouncers. In this last instance it is to be noted that none of the denouncers of the *demasias* were interested in the *cabida legal*. Mr. Bonillas testified also that he had made a large number of surveys of *demasias* in Mexico, and gave a list of the grants in which he had done this (R., 444). In every one of these cases the proceedings were under the law of 1863 (R., 226), providing a method of obtaining title by denouncement and payment of purchase money. And under this same law, even this very grant, the San Rafael de la Zanja, sacred as claimants say it is, from San Antonio Pass to Igo's and from the Jaralito to the red mountain, and dedicated as was every foot of it by the proceedings of 1821 to the uses of the grantees and their successors in title, has (so far as it lies in Mexico)

been denounced as public land and title therefor issued by the Mexican nation. There is something of irony in the fact that the denouncer of it as public land was Concepcion Elias, the very witness presented by claimants to identify its ancient and inviolable limits; and that the present owner of it claiming by Mexican patent treating it as public lands is Ignacio Bonillas, the very surveyor presented by claimants to show the location of those same ancient and inviolable monuments.

28. This law of 1863 was superseded in 1894 by one making similar provisions for acquiring title by petition, purchase, and payment. Throughout this uniform course of legislation there is present the same principle, that the title to the surplus of these grants is in the nation, that all that passed to the parties was title to the specific quantity, and that whether or not they afterwards obtained title to the balance is entirely dependent upon whether they pursued the methods provided by law for attaining that end. One thing, however, is clear from the reading of these laws, and is made still clearer from an examination of the exemplified copies from Guaymas in evidence, and that is that the original concession never gave title to more than the quantity. Counsel for claimants have failed to produce a single instance where one of these grants has been held by virtue of its terms to convey the fee to the extent of its survey. The unbroken construction in hundreds of instances is to the contrary, and it seems idle to argue the subject in view of the uniform construction given these matters by the Mexican au-

thorities. If the fee to *all* passed by the original *titulo*, why should legislation be provided to enable grantees to get title to the balance? What balance? If the fee to all passed, why require parties to make additional payment? They had already paid in full. If the fee to all passed, how can strangers to the original title, as in the Buenavista case, come in and get title to all except the *cabida legal?* It is not believed that there can be any question in the mind of the court that the original grant documents here presented passed title to not a single acre beyond the number of *sitios.* To hold otherwise is to ignore every authority, American or Mexican, to which we are justified in looking for a solution of the problem.

29. It is said, however, that this is manifestly a grant to exterior limits, for the reason that if considered one by quantity, and if located from a center point, as set forth in the decree, it will not include the *quality* of land sold to the grantees; that the amount paid the Mexican Government was for *3 wet* and *1 dry sitio*, and that a limitation to the 4 leagues at the Bonillas center will not give this character of land, which was the object aimed at in the original proceeding and the consideration for the purchase money. It is to be remarked, however, that even if the confirmation given by the court limited the quality of *sitios* below the quality paid for, a confirmation to the boundaries would immeasurably exceed it. Thus, even Mr. Bonillas admits (R., 155) that 7 or 8 wet *sitios* are found within his survey. The Government

witness Chalmers, and others, place the number much above that. So that counsel apparently contend that because the 4 *sitios* centering at the old Indian ruins do not contain 3 wet and 1 dry *sitio*, therefore they are entitled to a confirmation of a tract including four times as many wet and twenty-five times as many dry *sitios*. It is an argument that works both ways, and, to say the least, quite as forcibly against the proposition urged by claimants as in favor of it. But do 4 *sitios* located as in the decree fall below the *quality* prescribed in the titles? It is believed not. It would seem that the error of claimants' counsel arises in part from a misapprehension by them of the meaning of wet *sitios*. Thus, it was contended in the argument below that there was a difference in price between *sitios* on which a spring was located and those through which a stream ran. It is not believed that any law can be found to sustain this theory. The law of May 20, 1825 (Reynolds, p. 129), provides that the price for each *sitio* that has a "spring or river" shall be $60. Thus it is seen that the price was the same whether a spring or river was on the land. It is to be noted, further, that this price was not contingent on there being water at every point of the river within the *sitio;* since one spring—a single source of water—fixed the price at $60, so a single source of water in a river would suffice. Further, there is no guaranty in the law that the river would never go dry; the element present in fixing the price was the existence of "a river" within the *sitio*. As a matter of fact almost

all rivers in the western country go dry at certain seasons. (Kinney on Irrigation, secs. **39**, 44, 45.) The Rio Grande, the father of most of them, is dry for many miles during a portion of the year; but *sitios* through which the Rio Grande runs and in which it occasionally goes dry would no less be *sitios* "that have a river." So, because in the dry season the Santa Cruz is without water in some places for a couple of miles, is no reason why the *sitios* through which it runs are not through its entire length *sitios* "that have a river." Further, the appraisement in this Cameron case was made in October, a season when, according to the proof (R., 157, 169, 174), the rivers and springs have, perhaps, their greatest permanent flow. The appraisers fixed the price by what they saw at that time, based upon the lands as they existed at that time. Further, there is abundant proof to the effect that there is now much less water in the Santa Cruz Valley than in times past. Geological changes have caused a diminution in the water supply, but the principal cause of the difference has been the introduction of cattle into the country, by which springs that formerly existed have been tramped out and obliterated, or the headwaters of streams likewise destroyed by the removal of trees and vegetation by the hand of man. All of these factors must be taken into consideration; and the fact that there is not such an amount of water present now at these several center points as would lead claimants, if now making an appraisement *de novo*, to call them wet *sitios*, affords no

ground for declaring that eighty years ago there was no ground for the appraisers to call such wet *sitios*. The appraisement was no guaranty. It was simply an estimate based on the facts then before the officers—facts which might or might not have changed with the years as they rolled by. The appraisers examined the ground in October, and declared that there was enough water then upon 4 or 3 or 2 *sitios* to justify them in estimating that in the aggregate payment should be made for 3 *sitios* as wet out of the total 4. They decided that 4 *sitios* in the Santa Cruz Valley, starting the measurement from the place of San Rafael, were 3 wet, 1 dry. Their decision was not appealed from; was acted upon; was accepted. It is rather late to attack that judgment now. It is a *non sequitur* to argue that because there is not enough water on the Santa Cruz River now at and about old San Rafael to make what claimants consider the requisite *wet* sitios, there was not enough in 1821 to make what the appraisers considered the necessary number. It is their judgment eighty years ago, not claimants' in 1899, that is to govern.

30. But, as a matter of fact, on the records here presented, *sitios* laid off from center points, as contended for by either claimants or the Government, would in each instance contain the requisite number of *sitios* "that have a spring or a river." Counsel for Claimant Cameron contended in his brief filed below as follows:

> The evidence further shows that if a tract of land containing 4 *sitios* is measured in a square,

> taking the center of the grant as the center of such tract, the tract of land so secured would contain only 2 *sitios* having running water instead of 3 *sitios* with running water

In making this statement counsel evidently took into account only the northwest and southeast *sitios* and failed to take into account the southwest *sitio.* This latter, however, is a S60 *sitio,* as well as the others, and on two grounds: It is one of "those that have a spring" and one of "those that have a river." The spring within this *sitio* is called the Saucito. Witnesses who were in the country long before Mr. Cameron testify to the size and permanence of that spring and to the fact that it was used for watering stock when they were first in that country. So far from being a mere seepage, as counsel attempted to argue, the testimony of three or four witnesses is that the spring, ever since they have known it, has been a constant one, the water from which at times flows into the Santa Cruz River, nearly a mile distant. This testimony is uncontradicted in the slightest particular, Mr. Cameron, who went on the stand in rebuttal, having very discreetly abstained from referring to the subject at all. Further, an inspection of the maps filed by claimants shows that their center monument is east of the Santa Cruz River. A *sitio* lying to the southwest of and cornering at that center, therefore, necessarily contains a portion of the river, and if the east boundary of that *sitio* be a line due south from the center, nearly the whole of the river bed will be found to lie within it. That the river at the time Mr. Bonillas made his

observation was dry at this particular point does not detract from the fact that it is a river or from the fact that there is in this same *sitio* a spring, yielding a steady flow of water. Since either of these circumstances is sufficient to constitute a wet, or S60, *sitio*, this southwest *sitio* is thus the third of the *sitios* necessary to fill the call of the title papers as to quality. A similar number of the same kind of *sitios* may be located centering at the old place of San Rafael, the center point contended for by the Government. The same state of facts will be found to exist in the Agua Prieta grant (*Ainsa* v. *United States*, No. 35, present term), in which a claim for *demasias* is likewise made.

B.—*Was the law of 1835 a grant de novo or revalidation of the excess?*

30. If the title to only the named number of *sitios* and no more passed by the original *titulo*, it is further urged by claimants that the Sonora law of May 12, 1835, was a grant *de novo* or a revalidation to the parties of any excess within the monuments over the quantity named. This brings us to an examination of this law and its purposes.

31. It is to be observed that the grant here considered was made prior to the law of 1835 just cited, and hence such privileges as it grants were no part of the original contract between the parties. They did not buy with this law in view, because it was not yet in existence. It did not enter into or color the transaction and no vested rights to the privileges it extended

became the grantees' at the date they secured this grant or paid their money. Any privileges conferred upon the grantees by it were purely in the nature of a gratuity based upon no consideration, and extended as a matter of grace.

32. It may well be doubted if this law applies to any grants made by authority other than the State of Sonora. The wording of the law is in favor of "those who have acquired property in the lands of the State." As Sonora did not become a part of a State until January 31, 1824, when the State of the West was organized, and did not become a separate State until October 13, 1830 (Comp. Laws of Mexico, vol. 2, p. 231), when Sonora and Sinaloa were divided, the law of 1835, under this view, has no application to grants where the sale and payment were made to and the transaction closed with officers other than those of the State of Sonora. To this class belongs the San Rafael de la Zanja grant.

33. The purpose of the law 51, of May 12, 1835, was not to make a grant *de novo* or a grant at all to parties holding lands by tenure short of title. It was a revenue measure pure and simple—a statute of composition, an offer of sale, a privilege extended upon liberal terms. It forced no title on any one, it invested no one with title, but it extended a generous invitation to those who were occupying lands without title to cease living on the property of the nation. Recognizing that they may have made improvements, it provided that they might purchase these lands on

payment at the original schedule rate. That its character was simply a revenue measure is shown by the letter of Mendoza of February 23, 1839, above quoted from, in which Mendoza starts out by stating that "one of the *sources of public revenue in this department* is that from the composition and grant of lands for breeding cattle and horses," follows by a statement of the difficulties encountered, among them the fact above discussed, that considerable excess of *sitios* had been appropriated by grantees, 2 *sitios* being measured as 4, 4 as 8, etc., and then proceeds to say:

"In *consequence* the honorable Congress of the old State, during the Federal *régime*, notwithstanding the existing laws on lands, saw itself under the necessity of enacting other laws and decrees relating thereto, numbers 10, 26, *fifty-one*, 62, and 75, of May 30 and July 11, 1834, *May 12, 1835*, June 13 and July 17, 1835," etc. The laws of May 30, 1834, and July 11, 1834, appear at pages 184 and 186 of Reynolds's Compilation and contain provisions or systems of raising revenue from public land. The law of May 12, 1835, is *in pari materia*, a revenue measure, a plan not to give parties land, but to afford them an opportunity to acquire land upon exceedingly liberal terms, a liberality doubtless due to the stress of the great public necessity for funds to carry on the purposes of the Government.

34. Coming now to the wording of the law of 1835, it is to be remarked that counsel for claimants have, at the very outset, fallen into error in supposing that this law declares that the persons referred to in articles 1

and 2 are "the *owners* in good faith" of the lands they occupy. The proper translation is that they are "the possessors in good faith." The Spanish is "poseedor en buena fe." Poseedor does not mean owner. The definition given in Escriche's "Diccionario de Legislacion y Jurisprudencia" (9th edition, 1888) is:

> Possessor: He who has everything in his possession. Possessor is opposed to owner; because the possessor of a thing, accurately speaking, is not the owner, nor is he who has the property in a tract said to be its possessor. But he who has a thing as owner is called possessor, without really being such, whether he knows or is ignorant that the thing belongs to another. Every possessor is a possessor in good faith or a possessor in bad faith.

From this definition it will be seen that so far from declaring the possessor to be the owner, this law uses language which makes against the idea of ownership and simply declares that the possessor shall not be considered as occupying the land in bad faith as a trespasser, but "in good faith," with the privilege to him of securing the property or title by appropriate proceedings. (Hall's Mex. Law, sec. 1711.)

35. This is shown by the remainder of the law. If the owner does not denounce the *demasias*, any stranger to the title may at any time come in and denounce. If on resurvey no surplus is found, the denouncer gets none and has to pay for the resurvey. If, on the other hand, there is a surplus or excess, and that excess is not very great, the Government says to the owner

of the *cabida legal*, you may still get these *demasias* if you need them. But if, "in the opinion of the Government, based on the report of the treasury," this surplus is very excessive, the Government shall have the right to decline to issue title either to the owner of the *cabida legal* or to any one else. Since the question of what is very excessive rests "in the opinion of the Government" and is necessarily a matter of judgment based upon the location of the land, the amount of stock held by the owner of the *cabida legal*, his needs, etc., it is a very wide discretion and its exercise a final judgment from which there was no appeal. In effect, whether or not the owner of the legal area should get the *demasias* rested in the sound discretion of the officers of the Government, based "upon the report of the treasury." Not only did the "possessor in good faith" not have title, he had no *right* to acquire title by payment of the prices in force at the date of the grant. His only right was to appeal to the Government officials with an offer to pay, and they thereupon, if the amount asked for was in their judgment not excessive, *might* accept his offer and his money and give him title. The great difference between the legal area of 16,000 acres in this grant and the total area of 160,000 acres immediately arrests attention. The attention of the court has been elsewhere called to the fact that in none of the grants testified to by Mr. Bonillas as having been surveyed for *demasias* by him (a list of which he tendered as a part of his testimony), is there a grant with anything like a ratio between total and legal

area of ten to one. The amount here claimed is both unusual and extremely excessive, as shown by Mr. Bonillas's testimony itself. There is little doubt that it would have been held excessive by Mexican officials acting under the law of 1835. At any rate there is not the slightest doubt that they would under the law *have had the power and the right* to declare it excessive and to refuse to issue title thereto. Any such right held by that Government is held by the American Government, as its successor in sovereignty, and this Government has in effect already held that such surplus is excessive in that it has issued its patents to numerous parties for lands within the claimed boundaries. These latter acts constitute on the part of the Government a resumption of sovereignty or a declaration of the possession of sovereignty such as was discussed in *Repentigny's case* (5 Wall., 211), and there held to be the equivalent of "office found" at common law.

36. This law of 1835 being therefore a revenue measure and affording a mere invitation to parties to acquire title and a process by which they might acquire title, it is clear that it created no vested right. Being no part of the original contract between the parties it created no vested right as a matter of contract. Being a mere privilege extended by the Government upon no consideration moving from the grantee to the Government, it created no vested right as a matter of law. Since it was not a vested right, but a merely proffered one, it was within the power of the Government to withdraw it at any time before acceptance, or by the

change of government to a system inconsistent with its administration to make it of no effect.

37. If the law of 1835 was not repealed and its privileges withdrawn by the change from State government to National Government effected by the constitution of 1836, that result was certainly reached in the enactment of the Sonora State law No. 197, of May 14, 1852, above referred to. That law, which is comprehensive of the whole subject-matter of the law of 1835, undoubtedly superseded it. Under its provisions the owner of the *cabida legal* could no longer obtain the *demasias* by paying for them "at the price that governed when it was surveyed and appraised," as provided by the law of 1835; he must now pay at the rates in force at the date of the passage of that law, *i. e.*, May 14, 1852, and he must, in addition, prove to the satisfaction of the officers his ability to stock the *demasias*. Even this privilege was restricted in the quantity of the land thus attainable and in the time within which it could be obtained. By sections 2 and 3 it is provided that when the quantity of *demasias* is excessive, they shall be sold to the highest bidder. What is "excessive" under this law is left not to the judgment of the officials, as under the law of 1835, but is defined by the law itself to be cases where they amount to the third part of the land which the title may contain. Even where the *demasias* are not excessive, parties can not secure them "without public auction unless the original *expedientes* are presented to the treasury within one hundred days

from the publication of the law" (section 11). Since the *demasias* included within this San Rafael de la Zanja grant are vastly excessive under the definition of this law, it follows that in 1852 the owners of the San Rafael de la Zanja grant could not have secured a foot of land in addition to their *cabida legal* except at public auction, and that even if such *demasias* were *not* excessive, said owners must still have resorted to public auction to secure the *demasias*, there being no proof that they ever presented their *expedientes* to the treasury within one hundred days as required by said law. The acquisition of *demasias* was thus placed by this law of 1852, when applied to the title papers in this cause, on precisely the same footing as the acquisition of public land; and *demasias* then became in procedure, as they were before in fact, public lands of the state.

38. At the date of the Gadsden treaty, in 1853, all such public lands as were held by the States, including *demasias*, as just pointed out, were in the ownership of the nation. This is evidenced by the decree of May 29, 1853, one that has always been regarded as the law of Mexico and is found in volume 6, page 427 (No. 3866) of the Compiled Laws of Dublan y Lozano, published under authority of the Mexican Government. That decree is as follows:

MAY 29, 1853.

Decree of the Government:

Antonio Lopez de Santa Ana, etc., has been pleased to decree:

In order to carry out the purposes of article 16 of the law of the 14th instant, and to the

end that the directions [offices of directors] mentioned therein may be able to collect data on the different branches that now form the public treasury, exactly classified in the Memoria, they must present to the secretary of the treasury, it is declared:

ART. 1. The following belong to the dominion of the nation:

I. The vacant lands in all the Republic.

* * * * *

X. The real property which under former laws are the property of the nation.

ART. 16 of the law of May 14, 1853, above referred to, is, with other articles, in the following:

May 14, 1853. Decree of the Government.

Antonio Lopez de Santa Ana, etc., has seen fit to decree the following:

* * * * *

ART. 2. The property (*bienes*) of which the supreme government is in possession, and that which is considered as of the States and Territories, remains after this date at the disposition of the first, assuming its burdens.

3. The taxes and other general revenues of the States and Territories likewise remain at its disposition, and in the same terms.

* * * * *

6. The chief of the office of the treasury of the highest category there is in each State shall, for the present, exercise the functions which the law of April 17, 1837, assigned to the superior chiefs of the treasury.

* * * * *

> 16. The data concerning the branches under its charge having been collected in each direction, it shall present a memoria to the secretary of the treasury, in order that the Government, when informed of the number and nature of those branches, of the quotas, their products and otherwise, may determine what is conformable to a good administration of the treasury.

39. So by the Gadsden treaty all of these *demasias*, for which no denouncement had been made or title issued prior thereto, passed to the United States along with the remainder of the public domain, to be administered upon by this Government, not under an obsolete law of the State of Sonora, passed in 1835, or the law of 1852, or under the laws of the Republic of Mexico affecting its public domain in 1853, but under the laws of the new sovereign, the United States, as its lawmaking power should from time to time provide for the disposition of its public land.

40. As was said in *Pollard's Lessee* v. *Hagan* (3 How., 219, 225):

> Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.

41. Had this land remained in the Republic of Mexico in 1853, instead of being ceded to the United States, it could not have secured as *demasias* between 1853 and 1863 by payment of the price in force at the date of the grant. This for the reason that the privilege afforded by the State of Sonora in 1835 was manifestly not in force, and for the reason that there was no

law of the National Government between those dates affording grantees a like privilege. This is illustrated by the papers in evidence in the Agua Prieta case (*Ainsa, administrator*, v. *United States*, No. 35, this term, p. 354), where litigation was had between the Camous and the Elias family over the ownership of that ranch and the kindred ranches of Naidenibacachi, etc. The Camous claimed to have purchased the whole ranch in 1862 from the Eliases, the Eliases, on the other hand, claiming that they had sold only the *cabida legal* of 16 *sitios* and *had retained the balance*. To this the following significant reply is made in the pleadings for Camou:

> On the other hand, it does not appear in the deed of sale that the vendors had reserved any right whatever with respect to the aforesaid overplus (*demasias*), nor could such reservation exist, inasmuch as at the time of its execution *they belonged to the federation, and it was not until the 22d of July, 1863* [the date of the *demasias* law of 1863], when the President of the Republic, competently authorized, conceded to the possessors and *by way of grace the authority to denounce them* to the extent they had for a certain remuneration.

It does not appear that the district court, in deciding the case, directly passed judgment on this point, but the decision was in favor of the Camous.

42. The law of July 22, 1863, was a comprehensive scheme for disposing of the public lands. It was not peculiarly a law for the sale of *demasias*, but *demasias* were sold under it, for the simple reason that they were

public lands and thus within the purview of the law. Thus, article 1 of that law (Hall, § 613) defines public lands for the purposes of that law, declaring:

> All those lands in the Republic which have not been destined to public use, by the authority empowered therefor by law, nor granted by the same, with an onerous or lucrative title, to any individual or corporation authorized to acquire them, are public lands for the effects of this law.

The section of the law under which *denasias* were uniformly denounced for thirty years is article 5, which specifically recognizes that such denouncement is of public lands, being as follows:

> The possessor of a *tract of public land*, of whatever extension it might be, which at this date is cultivated or bounded with a ditch, fence, or artificial landmark, placed at least in all the angles of periphery, has a right to have one-half of the tariff price rebated, if he has had possession for ten years or a title translative of dominion, although it be granted by him who has no right to grant it.

Thus, under this law of 1863 the owner of the *cabida legal* has no title to the remainder of the land within artificial landmarks. On the contrary, the law speaks of these as "public land," and the only privilege which possession conferred was the right to acquire title by regular denouncement and the payment for the land at the same rate that would be paid for public domain, except where the possession has been held for ten years or the party holds a title translative of dominion. The documents introduced by the Government

in the Agua Prieta case (*Ainsa* v. *United States*, No. 35, this term, p. 212), show that the Mexican officials did not regard the original *titulo* of the grant as "a title translative of dominion" of the *demasias* so as to entitle the party to the reduction of one-half the price. Thus, in the proceedings for denouncing the Agua Prieta *demasias*, the owners did not base their claim to the reduction on the ground of having artificial landmarks and a title translative of dominion, but upon the combination of artificial landmarks and ten years' possession prior to the denouncement; and even this contention the Mexican officials overruled, holding that the ten years' possession entitling the owner of the *cabida legal* to half rate must have been ten years prior to July 22, 1863, not ten years prior to the denouncement. It was not until the Camous proved possession for ten years prior to 1863 that they were given title at the half rate allowed by section 5. And yet, according to claimants' contention *number one*, the Camous had title to the *demasias* during all this long struggle by them to secure said *demasias;* and according to claimants' contention *number two*, they had title to these *demasias*, subject only to the duty of paying for them at the price in force at the date of the grant. The practice of the Mexican officials, followed for thirty years, of demanding for these *demasias* the full price required for public lands, shows that this is not true; and certainly it would be a matter of supererogation for an American court to assume that it knows more about the construction of Mexican law than the Mexican officials charged with its administration.

43. That this construction of the law of 1863 is correct, and that the *demasias* of this grant were public property at the date of the treaty and have since always been so considered by the Mexican officials is shown by the following extracts from an official report made in 1885 by the minister of public works of Mexico to the Chamber of Deputies in the Mexican Congress:

[From the official report of the minister of public works to the Chamber of Deputies of Mexico, 1885, pages 9, 10, and 11.]

The law of July 22, 1863, treats of these overplus lands (*demasias*) in its articles 5, 6, 7, and 8. (Hall, p. 173.)

The executive has considered the *demasias* under two classes: The excess (*excedencias*) of lands where the excesses are protected by titles, their boundaries fixing a greater extension, and those which do not have the circumstance, because their titles are restricted to an extension less than that they possess, but which are protected by possession according to law.

The first are those possessed by virtue of the fact that when the titles were issued, either because of special circumstances of the places where they were situated or because of the lack of competent persons to make the survey, or because of the lack of instruments of precision, specific boundaries were designated, protecting only a certain amount of land, which amount, when the survey is made, turns out to be much larger than set out in the titles.

These lands are further divided into two classes: Those the sale of which was made *ad*

corpus—that is to say, all the area comprised within specific boundaries, which lands are lawfully possessed—and those the sale of which was made *ad mensuram*—that is to say, that *within specific boundaries* a specific amount of land was sold, which amount would have to be rectified at some time, as is now being done.

I call the attention of the chamber to the fact that in all these titles there is the clause that said lands were sold without prejudice to the King, which proves in a manner not to be doubted that only a specific amount was sold and *that any excess (sobrante) that might be found, when the measurements are rectified, belonged to the Crown, and now, as a logical and necessary consequence, to the nation.*

The second are those which proprietors have occupied in good or bad faith, extending the boundaries of their property, without being protected otherwise than by possession.

In either case *the nation has a right to these demasias* and it is its unavoidable duty to investigate them, in order to dispose of this element of public wealth according to law.

In order to carry on the investigation of said overplus (*demasias*), it is necessary to comply with all the provisions of said laws of July 22, 1863, and of the 15th of December, 1883, following the judicial procedure provided in the same. Consequently, no kind of abuses can be committed, there being therefore, no cause for the alarm among owners which has been spoken of on the floor of that chamber. It is possible, nevertheless, that some owners have become

alarmed, but they are, without any doubt, those who are occupying lands and are ill disposed to make use of the right given them by the law of July 22, 1863, in its fifth and sixth articles, or because they erroneously interpret the investigation by the companies which are acting in the representation of the Government, for those who possess land in good faith, on the contrary, have seen, in the measures of the executive, the lawful and honorable manner of legalizing their properties, avoiding conflicts for the future and giving their lands a real value, which their properties could not have when their titles were doubtful. These assertions are duly proved by the petitions presented to the department of public works by various owners, in which they themselves voluntarily denounce the overplus (*demasias*) which they have been possessing, and ask to enter into agreement with the Government.

44. The law of 1863 was superseded by the law of 1894, authorized by the Mexican Congress and promulgated by President Diaz in March of that year. This law (chapter 1, article 1) is entitled a law "regarding the holding and selling of *public lands* in the United States of Mexico."

Article 1 provides:

> The lands dealt with in this law, *which are national property*, shall, for the purpose required, be divided into the following categories: 1, Vacant lands; 2, surplus lands (*demasias*); 3, excess lands; 4, national lands.

Surplus lands (*demasias*) are defined by this law, (article 3) to be those held by private persons on primordial title, and to a greater extent than specified, such surplus, however, being within the boundaries mentioned in the title and consequently mixed up in its entirety with the area for which a title is held.

Thus in a law passed by the Mexican Congress and promulgated by the Mexican Government it is declared that "*demasias*" are among the lands "which are *national property*." Certainly no more authoritative source of construction can be found.

45. Mr. Orozco, at page 345 of Vol. I, thus discusses this law of March 26, 1894:

> We have already said that this overplus (*demasias*) consists of agrarian quantities which result within a well-identified perimeter, between the area covered by title and the area which the perimeter fixed by the respective title incloses *de facto*. Thus, for example, if the title concedes 1,000 hectares [2,471 acres] of land within fixed and determined monuments, and upon a new examination of it it is demonstrated that within those monuments there is not 1,000 but 1,500 hectares [3,706 acres], this excess of 500 hectares [1,235 acres] is what is to-day called national overplus (*demasias nacionales*).

Why "national property" or "national overplus" if private property?

46. Under this law, as under the law of 1863, *demasias* were denounced as other public lands and title issued only on payment of the price fixed for

lands by the tariff of that particular year. In this law, as in the law of 1863, a certain reduction from this price was made in the case of parties who have held possession of such lands as *demasias* or otherwise. This, however, was a concession to the equity arising from the possession, not to any right arising from the fact that these are *demasias*. It is a gratuity extended by the Government of Mexico not because of any right inhering in the owner of the *cabida legal*, but purely in the exercise of the governmental discretion and sovereign privilege of dealing with its subjects, or, as it is expressed in the Agua Prieta papers above quoted, "by way of grace."

47. This is shown in the price fixed upon the *demasias* by the laws of 1863 and the law of 1894. Unless there should be the element of possession to give the denouncer the right to a deduction from the price, he was required under each of these laws to pay for the *demasias*, not at the meager price which prevailed at the date of the grant, but at the tariff price in force for public lands for that year. This tariff under the law of 1863 (Hall, § 615) was published by the supreme general government every two years. Under the law of 1894, article 12, it is fixed by the Executive of the Union by means of a decree "to be published in the month of January of each year." A party denouncing these *demasias* in Mexico at any date between 1863 and the present time would have had to pay for them at the rate fixed for the particular year; and yet claimants here insist that the United States is bound to issue them a patent on

payment of the petty sum charged for sitios eighty years ago under the Spanish Government. In determining what right, if any, claimants have under the law of 1835, this court will not go far wrong in following the consistent construction given it for the last sixty years by jurists and legislators in Mexico. The law of 1835 made no grants *de novo;* it gave no vested rights. It conferred no right at all. To say that the offer it made could not be withdrawn is to say that Mexico had no right to supplant the law of 1863 by the law of 1894; that the United States had no right to repeal the laws providing for acquiring public lands by the preemption process (Frisbie *v.* Whitney, 9 Wall., 187); that no Government has a right to change the process by which its citizens may become the owner of portions of its public domain. The various grantees of this grant slept on their opportunities for acquiring title to their lands while such opportunities were open to them; they can not ask this Government to administer a Mexican system sixty-five years later, when they could not have that system administered were they now in Mexico and could not have had that system administered at the date of the treaty of 1853.

48. Claimants seek to avoid the position just advanced in the contention that all the legislation of Mexico since the law of 1835 is unconstitutional so far as it raises the price to be paid for *demasias* under the Sonora law of that year. They contend that the President of the Mexican Republic in 1863 did an unconstitutional act when he promulgated the law of July

22, 1863; that the Mexican officials have acted unconstitutionally in administering this law for thirty years; that Mexican jurists have been wrong in following it for thirty years, and that the Mexican nation has tolerated a usurpation of power in obeying it without a murmur or dissent for thirty years. Have the learned counsel ever heard of an instance where the constitutionality of this law has been questioned in Mexico? Are they not aware that ample methods of testing the constitutionality of any law is provided by the Mexican system? Have they ever heard of an instance where those methods were invoked for the purpose of testing this law? If so, they have signally failed to furnish such an instance. And the law of 1894; after having tolerated, as counsel claim, an unconstitutional law for over thirty years, we have the spectacle presented of the Mexican Congress enacting and the Mexican President approving a law equally unconstitutional, equally abhorrent to the principles of property. But, as to this law of 1894, can counsel cite an instance of its being questioned, of its justice or legality being protested against? Certainly, an American court should long hesitate to declare a foreign statute void when the people who have lived under it have by word and act for generations declared it valid. As was said in *Hornsby's case* (10 Wall., 224):

> We can not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution.

There can not be left with the court a more cogent statement of the principles that should control this branch of the case than is contained in the words of Chief Justice Marshall from the case of *Elmendorf* v. *Taylor* (10 Wheaton, 152).

> No court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal to correct such misunderstandings.

C.—*Were the demasias private property protected by the Gadsden treaty; and if so, is a claim to them cognizable under the act of March 3, 1891?*

49. The third contention of claimants apparently is that there was in the grantees at the date of the treaty a vested interest in the *demasias* and that such interest was and is a right of property protected by the treaty. In what has just been said the writer has attempted to demonstrate that neither under the law of 1835 nor any other law of Mexico was there a right to the *demasias* vested in the grantee, but that the *demasias* were public lands or national property subject to disposition under such legislation as the authorities might from time to time enact. If that position be sound, the case ends with its acceptance. If it is not, there still remains to be considered the question as to whether the claim here asserted is such a property right as is protected by the treaty and is cognizable by this court under the act of 1891.

50. No provisions of the treaty of 1853 are more familiar to this court than those contained in article 6, to the effect that no grants made previous to September 25, 1853, will "*be respected or be considered obligatory which have not been located and duly recorded in the archives of Mexico.*" It is contended by the Government that there was no such location or record of this grant as was required by the treaty, and that it is thus not within the terms of the act of 1891.

51. It is true that an arbitrary location might be made by this court, as was done by the court below, giving the claimants 4 leagues of land included within the outboundaries; but it is not believed that this court will, in the desire to give parties a quantity of land equal to what their predecessors in title purchased from the Mexican Government, overlook the plain limitation imposed upon the Court of Private Land Claims in passing upon this character of title. This involves a brief consideration of what that limitation is. It is to be noted that the above-quoted provision of the treaty applies not to invalid but to valid claims—claims which but for this provision would be entitled to recognition. There must have been some purpose in ingrafting this provision upon the Gadsden treaty. The United States had but five years previously, in dealing with the Mexican Government, concluded a treaty by which a vast area of land was transferred from Mexican to American sovereignty. The Gadsden treaty adopted most of the provisions of the Guadalupe-Hidalgo by reference, but in dealing

with the matter of grants an addition was made to the treaty, as above set forth. What was the purpose of that addition?

52. There was no requirement in the treaty of Guadalupe Hidalgo that the lands granted should be located prior to the treaty, the result of which was that large masses of land, particularly in California, were reserved from settlement and sale by reason of being within the exterior boundaries of some Spanish or Mexican land grant, and to guard against the repetition of such conditions this provision was inserted in the treaty of 1853. A comparison of the provisions of the two treaties will clearly show this distinctive difference. It is a universal rule of construction of all contracts and agreements, of particular force when construing the solemn acts of two sovereign nations, that every sentence, every phrase, and every word contained in the instrument shall be given some meaning, if possible. Particularly is this the case when two instruments of similar character have been made between the two parties, one of which differs from the other. In such case courts must conclusively presume that for some good reason such a difference was made, and must give force and effect to the difference, if possible. In this case the only difference between the two treaties is the word "located," and in compliance with the well-settled rules of construction it is the duty of this court to give that word some meaning. Now, what can it mean unless it applies to a grant like this? It can not apply to a general float—that is to say, to a grant of indefinite

quantity, or grants with the right to locate anywhere—for such grants have been universally held to be void by this court without any such words in the treaty, and there is no class of grants to which this word can apply except to that most common class of grants of a specified quantity of land within exterior boundaries containing a larger quantity. If, then, as has already been said, this be a grant of four *sitios* of land to be located within exterior boundaries containing thirty-five *sitios* in excess of that quantity, and the same was by the terms of the treaty to be located before it could be recognized by this Government, and if in fact it had not been located prior to 1853, this fact makes it unlawful for the Court of Private Land Claims to confirm this grant, and this court is bound by the provision creating the court from which this appeal is taken.

It happens that the first of these land cases from Arizona to come before this court for consideration on the question of quantity was this very San Rafael de la Zanja claim under the title of *Cameron* v. *United States* (148 U. S., 301). This court, in deciding that case in 1892, left to the Court of Private Land Claims, which had just been created by Congress, the question of the true extent of that grant under the title papers, but, in passing upon the title papers there involved, says:

> While a grant of 4 leagues in the place called San Rafael de la Zanja standing alone would appear to have been a grant of a certain quantity of land, when it appears by the same instrument that the limits of the grant were to be

designated by landmarks of stone and mortar, that such designation was actually made, and that juridical possession of the land was delivered in pursuance thereof, it is at least open to doubt whether it does not fall within the class of concessions by specific boundaries as these grants are distinguished in *United States* v. *McLaughlin* (127 U. S., 428). *Under the view taken by the court below*, that the grant was only 4 square leagues of land, it was evidently a mere float, and defendant would have no color of title to any specific land until the same was designated and would have no authority to monument and fence on any part of the tract.

As the court below, and this court in other cases, has limited the character of grant now under consideration to the quantity paid for, those holdings, if now sustained and adhered to, bring the case entirely within the rule announced by this court in the case above cited and quoted, to wit, that this grant is a mere float, and is precisely of the character of grants disclosed in the *McLaughlin case* (127 U. S., 428) and the *Fremont case* (17 How., 542). The nature of a float is further discussed in the cases cited, and in *Cameron* v. *United States* (148 U. S., 309); also in *United States* v. *Armijo* (5 Wall., 445), *Miller* v. *Dale* (92 U. S., 473), *Carpentier* v. *Montgomery* (13 Wall., 480), *Hornsby* v. *United States* (10 Wall., 232), *Snyder* v. *Sickles* (98 U. S., 203). In the McLaughlin and Fremont cases, especially, the character of title here asserted is discussed, and in these and the other cases above cited is pointed out the fact that a Mexican grant of quantity, located

within exterior boundaries containing a greater quantity, does not, until located, take precedence over a grant made subsequently within the same outboundaries but located first. The identity of the character of title here asserted with those shown in California cases in which this court held, as above set forth, that a grant under the conditions developed by this record was a float, is made quite evident by the more recent case of *Ainsa* v. *United States* (161 U. S., 208), involving the Nogales grant, and the construction placed upon the sixth article of the Gadsden treaty in that case was again announced in the case of *Ainsa* v. *New Mexico and Arizona R. R.* (175 U. S., 76, 84, 85) involving the right on the part of the claimant of the Sonoita grant (*Ely's Administrator* v. *United States* 171 U. S., 220) to proceed upon it in the local courts as a complete and perfect title during the interval between the establishment of the Court of Private Land Claims on March 3, 1891, and the institution of the suit by the United States to test the validity of that claim, where Mr. Justice Gray for the court says (pp. 84, 85):

> The treaty of December 30, 1853 (known as the Gadsden treaty), by which the Mexican Republic ceded to the United States additional territory now within the Territories of New Mexico and Arizona, including the land in controversy in this case, provides, in article 5, that all the provisions of the eighth and ninth articles of the treaty of Guadalupe-Hidalgo shall apply to the territory thus ceded "and to all the rights of persons and property, both civil and ecclesiastical, within the same as fully and as effectually

as if the said articles were herein again recited and set forth;" and, in article 6, that "no grants of land within the territory ceded" bearing date since September 25, 1853, "will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." (10 Stat., 1035.) This last clause has been held by this court to require an authentic survey and final determination of the location and boundaries of the claim. *Ainsa* v. *United States* (1895), 161 U. S., 208, 222. But in the case at bar the plaintiff set up a complete grant, surveyed and located by definite boundaries long before September 25, 1853.

That case, however, was submitted to the court below on an agreed statement of facts which located the grant by definite outboundaries.

53. The contention of claimants in the court below was, however, that the *Ainsa* (Nogales) decision, so far as it holds such grants not to have been located at the date of the treaty, has been overruled by the later cases of Ely and others. These last cases proceed on the theory that a center or initial point being established, such point locates or nails the grant to the earth's surface, and it thereupon becomes a mere matter of mathematics to lay off the grant according to the measurements and quantity. Since the hearing of these cases the existence of law number 197, of May 14, 1852, has, however, been for the first time developed, under the terms of which it appears that the owners of the *cabida legal* were given the right to

locate that quantity at any point within the boundaries at their option.

54. Section 4 conferring this right is as follows:

> The possessors within the general area of their titles may select the principal land that may best suit them, provided they leave the *demasias* regularly united in one body in order that the treasury may alienate them to advantage.

Where the "possessors" fail to appear and locate their quantity that power seems to have been exercised by the Government surveyor. This is shown in the Chupisonora *expediente*, the one referred to by Mr. Bonillas in his testimony, and a copy of which has been secured from Mexico since the trial below. From that *expediente* it appears that the Government officer who made the resurvey notified the owner of the legal area to appear and to select his quantity as might best suit him within the outboundaries; the latter failed to do so, whereupon the officer set apart for him the quantity originally purchased, locating it so as to include the improvements made by the owner.

Under the terms of this law it is apparent that the location of the quantity within the outlimits was a matter, in the first instance, for the owner, or if he failed to act then for the Government. If the *sitios* purchased were all dry and were, for example, 4 in number, where the monuments inclosed 8 or 16 dry *sitios*, any 4 out of these 8 or 16 *sitios* could, under this law of 1852, be selected by the owner, and until so selected his grant was a float and unlocated. It was a right to 4 *sitios* anywhere within certain limits; or,

as said by the court below in another case, "the grant was specific as to quantity, but not as to location." In other words, it was precisely like the California grants, such as that mentioned in the *McLaughlin case* (127 U. S., 428), except that in the latter cases the right of location was reserved to itself by the Government and in the former cases it was, by the law of 1852, given, in the first instance, to the owner of the *cabida legal*. In either event, not being located at the date of the treaty, such a grant is not protected by the Gadsden treaty.

55. The argument of counsel that this grant is distinguished from the California "floats," in that in those cases the excess "was always expressly reserved to the sovereign by a conditional clause in the title papers," is answered by the court below in the Ainsa decision, where it is said: "The intent of the granting officer to reserve to the Government the excess over the amount granted within the boundaries is as clearly manifested as it could have been made by a reservation in express language."

56. It is not sufficient to say that the land is located by the "quality" mentioned in the *expediente*. In not a single case now before the court would the application of this principle remove the element of uncertainty. In Cameron's case, the *expediente* calls for 3 wet *sitios*. According to Mr. Bonillas's testimony there are no less than 6 or 8 wet *sitios* within his survey. The Government witnesses make the number much greater. Which 3 of these 8 or 12 wet *sitios* is meant by the title papers? Does it identify any 3 of them as *the* 3

in a manner such as enables the court to say those are the 3 contemplated by the grant? If not, and if the designation of the particular 3 was left open for the future selection, choice, or location, and such selection had not been made at the date of the treaty, then the grant was unlocated at the date of the treaty. So as to the 1 dry *sitio* in the Cameron's case. Where is this located? There are 40 *sitios* in the grant. Deducting the 10 or 12 that are wet, there are still 30 dry, any one of which answers the description of the *titulo* as to quality. If the owner of the legal area has the right to locate his dry *sitio* anywhere he desires within these 30, and at the date of the treaty had not done so, his grant was unlocated. The same state of fact is illustrated in Perrin's case (*Perrin* v. *United States*, No. 97, this term). There 6 wet and 3 dry *sitios* were granted. The proof shows that within the survey there are no less than 10 or twelve wet *sitios*. Which 6 of these were granted? Which 2 dry *sitios* of the remaining 20 dry *sitios* were granted? The remaining grants now pending before this court have the same state of facts, leading to the irresistible conclusion that since the location of the *cabida legal* was a matter of choice for the grantee under the laws of Mexico (as shown by section 4 of the law of 1852), and as that choice had not been exercised at the date of the treaty the grants were not located at that date.

57. The court below, following certain intimations in *Ely's case* (171 U. S., 241), held this to be a grant for 4 *sitios* centering at the point adopted by Bonillas

as his center or initial point, apparently holding that the existence of this center fixed the *locus* of the grant at the date of the treaty and thus brought it within the terms of the treaty. While it is true that the grant as confirmed by the court gives the quantity and the quality as stated in the titles (as has been already pointed out), it is not the only location that will do so within the outboundaries. A half dozen other locations could be made to give claimants four sitios, three wet and one dry; which one of these locations is to control? And is a choice of location to be made *now?* Must it not have been made at the date of the treaty to entitle the claim to recognition? It will not do to say that claimants did not know at the date of the treaty that they were holding more than 4 *sitios* within their survey of 40. Such an assumption, as will hereinafter be pointed out, is to presume against their sanity. It will not do to say that they had no opportunity to locate their legal area. The law of 1835 and the law of 1852 gave them this privilege. If they saw fit to ignore this opportunity, and came within the limits of the United States holding an unlocated grant, they must suffer the penalty imposed by the treaty, which is the loss of their lands. Counsel for claimants indeed admitted in the argument of the case below that if this was not a grant to the exterior boundaries, then it was never located and is not entitled to confirmation under the English version of the treaty.

58. Nor can it be contended that the original survey of 1821 was a "location" of the grant that satisfies the

terms of the treaty. Under the original proceedings "only a specific amount was sold and any excess that might be found when the measurements were rectified belonged to the Crown, and afterwards as a logical and necessary consequence to the nation." (Official report in 1885 by the minister of public works of Mexico to chamber of deputies, quoted *supra*). This was the law when this grant was made, and was as much a part of the grant as though actually recited in it. The intent to reserve to the Government the excess over the amount granted within the boundaries was "as clearly manifested as it could have been made by a reservation in express language." It can not be presumed that the grantee did not know he had more than 4 *sitios*. Such a tract is a square with sides 2 leagues or about 5 miles in length. The original surveyor says his sides are 4 leagues or 10 miles. The Bonillas survey has sides of from 15 to 20 miles. Knowing as the owners must have known that they were holding more than they had paid for, they had ample opportunity to secure the balance. This opportunity was given by the law of 1835, but they failed to act upon it, although scores of others were doing so. It was given them by the law of 1852, and yet they failed to accept it. Although for eighteen years before the treaty—assuming that the law of 1835 was the first Mexican legislation providing a method for the acquisition of the excess—they had the privilege of segregating their legal area and getting title for the *demasias*, they failed to do so. The

date of cession came; their granted quantity was still, using the language of the law of 1863, "mixed up in its entirety with the area for which a title is held;" they had taken no steps to segregate it, to locate it with respect to the remaining 140,000 acres, within the boundaries; and the two contracting nations stipulated that grants "not located" shall not be recognized by the American Government. Is this treaty provision to be respected or is it to be ignored?

59. The question is not what parties claiming under these grants could now get under Mexico were the property still in Mexico, but what under the treaty which fixes the obligation of this Government and the jurisdiction of the court they are entitled to receive from the United States. It might be conceded in any one of these cases that claimants could now, by virtue of the law of 1863 as modified by that of 1894, secure recognition of and the privilege of locating their *cabida legal* were they in Mexico, but it does not follow from this that they are entitled to the same thing from the United States. Their rights under the United States are limited by the terms of the treaty, and it is to be repeated that the limitations imposed by article 6 are limitations upon the recognition not of void but of valid grants, thus showing that it was the intent of the high contracting parties in 1853 to stipulate for the nonrecognition of certain grants that Mexico itself would have recognized, and did recognize, as valid. The fact that such selection and location of the *cabida legal* had not been made at the date of the treaty precludes recognition under the treaty.

60. Another treaty barrier to the confirmation of this grant is the fact that it is within the class of claims denounced by the treaty as not "duly recorded in the archives of Mexico." As was said in the brief for the United States in the Ainsa case:

> A proper construction of this provision of the treaty requires that the existing state of the law should be considered; that is to say, the laws of the country in which these records or archives were to be found. It is well known as a matter of history that the manner of preserving records of grants and other important instruments in Spain and Mexico was different from that which obtains in this country, and that the customary manner of preserving records of proceedings leading up to a grant in Mexico was to deposit the original in the archives and give to the proper party a copy of such original, which was known as the testimonio, duplicate, or second original. There was also a requirement that a memorandum of the grant should be entered in the proper book, called "Toma de Razon," and when a history of the original proceedings (*expediente*) was properly deposited in the archives and a minute of the grant entered in the "Toma de Razon" this constituted a record of the grant, and when these two steps had been taken the grant had been "duly recorded" as provided by the treaty, and until both these steps had been taken the grant had not been "duly recorded."

61. It seems unnecessary, as showing what is meant by a "record," to do more than to cite the court to the long line of California cases, beginning with *Fuentes*

v. *United States* (22 How., 443) and running down to *Peralta's case* (3 Wall., 434). In *Luco's case* (23 How., 515) it was held that no grant should be received as genuine by the courts of the United States "unless it be found noted in the archives, or the *expediente*, or some part of it, be found on file among the archives where other and genuine grants of the same year are found." In *Bolton's case* (23 How., 347) it was held that the record referred to in the regulations of 1828 is "the *evidence* of the grant," and that while the titulo given by the governor "serves among individuals the purpose of evidence," the Government, when it institutes inquiries in reference to the subject, is "entitled to require the production of that official record which it has prescribed to its officer for its own security and as a necessary condition of a legal administration and as a necessary precaution against fraud." So *Vallejo's case* (1 Black, 541), quoting *United States* v. *Sutter* (21 How., 175), says that "in every well-regulated government the deeds of its officers conveying parts of the public domain are registered or enrolled to furnish permanent evidence to its grantees of the origin of their title." So, in the *Peralta case* (3 Wall., 434), it was said:

> But the important fact to be noticed is that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition and enabled the Government to ascertain with accuracy what portion of the public lands had been alienated. The record *was the grant* and without it the title was not

> divested. The governor was required to give a document to the party interested, which was evidence of title and enabled him to get possession, but his "*titulo*" did not divest the title unless record was made in conformity with law.

To the same effect are the *Teschmaker case* (22 How., 405), the *Pico case* (22 How., 406), the *Castro case* (24 How., 346), case of *Knight's administrator* (1 Black, 228), *Neleigh's case* (1 Black, 298), *Romero's case* (1 Wall., 743). *White's case* (1 Wall., 660), the *Berreyesa case* (23 Lawyer's Coop. ed., 912), and the more recent cases of *Ortiz* (176 U. S., 422), *Elder* (177 U. S., 104, 118), and *Whitney* (181 U. S., 109).

Perhaps the latest expression from this court on this point is found in *United States* v. *Elder* (177 U. S., 118), where this court, speaking through Mr. Justice White, says:

> The constituents of the preliminary papers leading up to a grant and of the grant itself, and the distinction between them, to which attention had been so often directed by this court, was pointedly reiterated in the statement of the case made by Mr. Chief Justice Fuller in *Ainsa* v. *United States* (161 U. S., 208, 219), as follows:
>
> "An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant of [or?] final title paper[s] is attached to the testimonio and delivered to the grantee as evidence of title, and entry is made at the time in a book called the Toma de Razon, which

identifies the grantee, date of the grant, and property granted."

It is manifest from the foregoing review of the decisions under the California act that it was held that in order to vest an applicant under the regulations of 1828 with title in fee, either absolute and perfect, or conditional and imperfect, to public land, substantial compliance with the preliminary requisites to a grant was essential. It was necessary that a grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record, in some form, was required to be made of such grant.

62. From these cases and from the usages of the officials of Mexico, known to this court as a matter of history connected with this litigation, the presence of the *expediente* in the archives and an entry of the issuance of title in the book of Toma de Razon together make up the record. There is no proof of a *toma de razon* having been made of the San Rafael de la Zanja grant.

63. It is sought to obviate the force of this defect in this case by the following indorsement, found at the end of the *titulo* presented by claimant:

> Entry of this title is made at folio 3 of Book No. 2 that exists in this commissariat.

It does not appear when or by whom this indorsement was made. For aught that appears to the contrary it may have been made years after the treaty, and by an entire stranger to the transaction. Its presence is thus no evidence of the fact that such an entry

was made. But even had it been established that this indorsement was made by the officer issuing the title, it would still not establish that an entry was made in such a book. Such a recital would stand on no higher ground than a recital that the prerequisites for a grant had been complied with, and it is distinctly held in the case of *Fuentes* v. *United States* (22 How., 443) that such a recital was not sufficient ground for the presumption that such prerequisites had been observed. The fact that there is a similar indorsement on the *expediente*, made though it be over the *rubrica* of Ramon Romero's "esteemed friend," Mendoza, to the effect that final title was issued May 15, 1825, does not add to the probability of the truth of this first recital, since it appears from the paper of January 16, 1831, introduced on the trial (R., 532), and also signed by Mendoza, that as late as that year the *título* had not issued but still awaited the payment of certain fees by the grantees. Further, that recital is at best but secondary evidence, the best evidence undoubtedly being Book No. 2 itself. It is shown by the testimony that there are two books of *toma de razon* in the Hermosillo archives—No. 1, and a second unnumbered. The first contains entries for 1824 and 1825, and the other entries from 1831 to 1849. The last entry in Book No. 1 is May 13, 1825, two days before the date of the *título* presented, and is followed by a number of blank leaves. There is no entry of this grant in that book, although there is much blank space following the entry of May 13, 1825, that would

be suitable and appropriate for such entries. There is no entry of this title in the other book. If the latter be Book No. 2, its contents affirmatively show that there is no *toma de razon* of this grant where the indorsement says there is. No proof is offered of the loss of any book of *toma de razon*. So that even if the unauthenticated indorsement on the *titulo* prove that a *toma de razon* was made in such a book, the case still lacks the proof of loss necessary to bring it within the rule laid down in the *Peralta case* (3 Wall., 434), where it is said:

> If the claimant can show to the satisfaction of the court *that the grant was made in conformity to law and recorded, and that the record of it has been lost or destroyed*, he will be permitted to introduce secondary evidence of it. But the absence of record evidence is necessarily fatal, unless that absence can be accounted for.

64. This grant is further barred from confirmation, so far as the *demasias* are concerned, by the absence of any provision in the treaty permitting the performance of conditions unperformed at the date of the treaty. Under the view of the matter of *demasias* taken by the Government, the payment of the purchase money therefor and the proceedings leading up thereto were all conditions precedent, without the performance of which no title vested and no interest accrued. On the other hand, claimant's contention seems to be that all these proceedings, including payment of the purchase price, were conditions subsequent, and that the right to perform these conditions subsequent subsists at the

present time—forty-eight years after the signing of the treaty. It is believed that this proposition is foreclosed by the history surrounding the treaty of 1853. That treaty (article 5) adopts by reference the provisions of article eight and nine of the treaty of Guadalupe Hidalgo for the protection of property rights; which throws us back to the treaty of Guadalupe Hidalgo for a construction of the meaning of the word "property." That it does not mean such titles as rest for their completion upon the performance after the treaty of some condition is shown by the action of the Senate of the United States in striking out section *ten*, which specifically stipulated for a new period for the fulfillment of conditions after the treaty, where they had not been fulfilled prior to the treaty. This diplomatic incident is discussed fully in the case of *Interstate Land Company* v. *Maxwell Grant Company* (139 U. S., 588), where it is specifically held that as "that claim had never been perfected prior to the treaty of Guadalupe Hidalgo it was not protected by virtue of that treaty." The principles of law announced there are controlling here. If a party may now, by paying the price in force under the Mexican régime, make himself entitled to a *título*, why might not Beales, the star figure in the Maxwell case, have, after the treaty, brought in his colony and thus, by complying with the condition of his grant, have been in a position to demand title? Certainly, his introducing a colony was no more a consideration for his grant than the payment of the purchase money is a consideration for a grant of the

demasias under the Mexican system. If the equities are in favor of either party, there is much in favor of Beales. In this case the performance of the condition of introducing a colony became impossible by reason of the war between Texas and Mexico and the achievement of the independence of the former prior to the time within which such performance was required. Beales thus had a good excuse for the nonperformance of his conditions. The predecessors in interest of claimants, however, had none. According to contention of counsel, they had the right to pay this money at any time and receive a *título* for the *demasias*. They preferred, however, in the years spent by them under the Mexican sovereignty to withhold from the Government the purchase price, which they now admit was due it; to squat on the lands; to live upon the bounty of the public and presume upon its privileges; and now, sixty years later, to come into a court of equity to ask for a title. Certainly there is little equity to be found in their withholding a payment which the law says they should have made over a half century ago. To say, as counsel have urged, that these grantees did not know they were in possession of more than the amount granted is to make an unwarranted reflection on their sanity. The Zanja grantees knew from their *título* that they had at least 16 sitios, 2 leagues each way from the center, when they had paid for only 4 *sitios*. Can it be conceived possible that these people could believe the 40 *sitios* alleged to have been within their monu-

ments to be 4? Where is the man that does not know 1 from 10; 1 mile from 10; 1 acre from 10? And these pastoral people, accustomed to outdoor life, to traversing distances, to estimating measurements, knew better even than would we of the present day just what they held. If they were uncertain, it was not the duty of the Government to take the initiative, but their duty.

65. This was what was done by the parties in the Agua Prieta, the San Pedro, the Buena Vista, the Ainsa cases—in every Arizona grant that has come before this court lying partly in Mexico. The Government in no instance took the initiative; the claimants in every instance did. The only exception is the case at bar, in which the initiative was taken neither by the Government of Mexico nor by the claimants, but by Concepcion Elias, who secured as public domain all this grant lying in Mexico and promptly sold it to Ignacio Bonillas. Claimants' contention that they had a right supinely to wait until the Government instituted an inquest into the amount of property held by them and to pay the purchase price only when pursued to the earth by the agents of the nation armed with an execution is hardly in keeping with the uniform procedure above cited or with the spirit of the law of 1835 or the law of 1852, providing for the composition of lands and the raising of revenue thereby. If the grantees had such rights, based on condition, as claimants assert for them, they slept on those rights, and by the treaty they were forever foreclosed of the

right to perform such conditions, whatever their right to do may have been prior to September 25, 1853. In the words of the Maxwell case, above cited, such a claim or right "was not protected by virtue of that treaty," and was "one of the class which was expressly refused to be recognized by the treaty."

66. Among the limits upon the court's jurisdiction imposed by the act of 1891 is one to the effect that imperfect claims in respect to which no petition shall have been filed by March 3, 1893, "shall be deemed and taken, in all courts and elsewhere, to be abandoned, and shall be forever barred." That this claim, at least so far as it asks for a confirmation of *demasias*, is at best only an imperfect title, is in effect admitted by the contention that the payment of the purchase money now tendered is the performance of a condition subsequent. That it is equally an imperfect title so far as it relates to the unsegregated, unlocated *cabida legal* of four *sitios* is shown by the following definitions of a "perfect title:" Thus, in *Steinbach* v. *Moore* (30 Cal., 508–509) it is said:

> A title derived from the same [the Mexican Government] was not perfect while *any further act* was required on the part of the Government, or that of the United States as its successor, in order to invest the claimant with the entire legal title to and the absolute possession of the specific lands granted.

So in *Paschal* v. *Perez* (7 Tex., 348), *Hancock* v. *McKenney* (7 Tex., 384), and *Stevenson* v. *Burnett* (35 Cal., 432) a perfect title is held to be "one which

does not require a further exercise of the granting power to pass the fee in the lands; it is a title which conveys full and absolute dominion, not only as against all private persons, but as against the government, and which may consequently not be disavowed by the political or granting power, and stands in no need of reaffirmance from such a power."

67. The status of this claim at the date of the treaty when measured by the definitions of a perfect title just given will be readily seen to be far from a perfect title, both as to *cabida legal* and *demasias*. No one can for a moment contend that under the Mexican system in force in 1853 the claimants of this grant were possessed of the legal title to and "the *absolute possession of*" *the demasias* or that they held "full and absolute dominion of the *demasias* not only against private parties, but against the Government," or that their title to the *demasias* needed "no reaffirmance from such power." Nor as to the 4 *sitios* paid for, unsegregated as they were at the date of the treaty from "the entirety" of the total area of 16 *sitios*, as shown by the measurements, or 25 or 40 *sitios*, as shown by the monuments, and unlocated as they were in a tract ten times as large, a tract containing several times over the quantity and quality paid for, can it be said that they constituted a perfect claim or a perfect title. To what 4 *sitios* did the grant confer "the entire legal title," and to what "specific lands granted" did it confer "absolute possession?" To what 4 *sitios* of the 40 did it pass "full and absolute dominion" against all private persons and

against the Government? What 4 *sitios* did it convey with such effect as to have no need of reaffirmance from the Government? It is entirely evident that as to both *demasias* and *cabida legal* the title held at the date of the treaty was at best inchoate and incomplete.

68. If this claim be an imperfect one and if the petition under which its confirmation is invoked was filed after March 3, 1893, the confirmation is barred by the provisions of section 12 of the act of March 3, 1891, above quoted. That the Cameron petition was filed after March 3, 1893, is shown by the record in this case. Although the Green petition was presented to the court prior to March 3, 1893, there was no appearance for him at the trial, and it was made to appear affirmatively from the evidence that Green had at the date of the filing of his petition no interest in the premises and no right to invoke the jurisdiction of the court. The case thus reverts on the pleadings filed by Cameron and Christie. There was no appearance by Cameron until 1895, when he filed an answer denying Green's right to bring the suit and disclaiming so far as he was concerned any desire to secure relief from this court. Christie did not appear until 1899. It was not until 1899 that Cameron came before this court asking affirmative relief and thus became in effect a plaintiff. His rights must be tested as of the date of the filing of his petition. This latter was filed six years after the date fixed by law for the presentation of imperfect claims, and his suit must be held to be

too late, and his claim "to be abandoned and forever barred."

United States v. *Patterson*, 15 How., 11;
McMicken's case, 97 U. S., 208.

69. If the Government's contention that this grant is imperfect be sustained by this court and all its other positions overruled, the confirmation must still be confined to 11 *sitios* under the limitation of imperfect titles imposed by subsection 7 of section 13 of the law of 1891.

70. Even if the claim to the *demasias* were property protected by the treaty—which we have attempted to show it is not—it is still not such a property claim as is cognizable by the Court of Private Land Claims, under the act of March 3, 1891. The terms of the latter act are, of course, the limit of the court's power to recognize the rights protected by the treaty. Substantial equities in property may in some instances exist within the terms of the treaty and yet that court be under the act of its creation entirely without jurisdiction to recognize or confirm them. That class of cases Congress has necessarily reserved for its own determination or for assignment to a judicial tribunal under future legislation. Some instances where at least equitable rights are acknowledged, but the power of this court to afford relief is denied, are afforded by the following cases:

Santa Fe case, 165 U. S., 675;
United States v. *Sandoval*, 167 U. S., 290;
Zia v. *United States*, 168 U. S., 198.

71. The confirmation of the *demasias* is also precluded by subsection 8 of section 13, which provides that "no concession, grant, or other authority to acquire land made upon any *condition* or *requirement*, either antecedent or subsequent shall be admitted or confirmed unless every such condition or requirement was performed within the time and manner stated in such concession, grant, or other authority to acquire land."

Viewed in its most favorable light this payment of the purchase price for the *demasias* is a requirement subsequent. It had confessedly not been performed at the date of the treaty, although claimants had had twenty or more years at that time to perform it. This claim must be passed upon by the court as of the date of the treaty, the rights of property protected being those in existence then. This is thus a claim whose *status* became fixed in 1853, when the treaty was concluded; that *status* included the nonperformance at that date of a necessary condition, and claims in which there is a nonperformance of condition or requirement are excepted from the jurisdiction of the court. (*Cessna v. United States*, 169 U. S., 188.)

72. The United States, by reason of its attribute of sovereignty, is not subject to suit save by its consent, and then only to the extent it has consented. The fact that the act of 1891 provides no machinery by which conditions unperformed in 1853 can be performed now is proof that the jurisdiction it confers was not intended to include cases of that character. If the

Court of Private Land Claims is authorized to accept money where payment was a condition, why might it not accept the organization of a colony where such was a consideration for the grant and a condition comprehended by it, but not yet complied with? Why might it not accept the establishment of a merino sheep farm, which constituted the unfulfilled condition, fatal to the José Sutton claim, case No. 143 on its dockets? Why might it not allow the digging of a well, which was the nonperformed condition in the *Vigil case* (13 Wall., 449)? If one of these conditions is to be allowed performance, why not all? And if all, who are to see that the colony is properly introduced, that the well is dug the requisite depth, that the merino sheep are of the necessary size and fatness? Is it the court, the clerk, or the counsel for the Government? Surely there is nothing within the act that imposes these several and onerous duties upon either of the officers provided by the act of 1891, and no one would for a moment contend that there was any such duty resting upon them or either of them or that the performance of any such duty would bind the United States without a statute specifically constituting such officer an agent of the Government for that purpose. Not less absurd in principle than the supervision by the court of the digging of a well or the establishment of a merino sheep farm is the suggestion that the court is authorized to preside at a sale of land, at the acceptance of purchase money in consideration of one of its judgments decreeing a confirmation. Is the court to

pass upon the question of whether the *demasias* sought to be purchased are excessive? This is required by the law of 1835. Is it to determine whether the denouncers have the means to stock the *demasias?* That is required by the law of 1852. Is it to conduct "the public auction" where, as in this case, the *demasias* are excessive? That is the only method of their acquisition under the law of 1852. Where is the law that authorizes the court thus to barter the public lands, to make its decrees contingent on the payment of purchase money, to conduct a land-office business? Where is the law that authorizes its clerk to receive such money on behalf of the United States? Where is any law providing for the payment of such money into the Treasury or authorizing its receipt by the Treasury? What agent at the National Treasury is authorized to take such a sum for such a purpose? Certainly, had this character of procedure been in the contemplation of Congress in framing the act of 1891, it would have made it evident. Whatever may be the powers of courts of general equity jurisdiction with regard to tenders and the acceptance of tenders, such principles can have no application to a court of statutory jurisdiction only, especially where one of the parties is the sovereign who submits himself to litigation with the subject only upon certain prescribed terms and within certain well-defined limits. The act of 1891 is as expressive in what it does not say as it is in what it says.

73. This character of claim is precluded from confirmation by subsection *one* of section 13 of the act

of 1891. The *demasias* were certainly not held by perfect title. They did not constitute such a claim as claimants would have had a lawful right to make perfect. As we have seen above, the law of Sonora of 1835 was not in force in 1853, having been superseded by the law of May 14, 1852. But even were the rights conferred by the Sonora law of 1835 in force in 1853, it was not a right to demand title, but a right to secure it upon performance of a financial condition and upon satisfying the proper officers that the *demasias* asked for were not excessive. There was intervening between the status of the claimants in 1853 and the possession of the title in 1853, if we consider the law of 1835 as then in force, two obstacles—one the payment of the money, the other the proof to the satisfaction of an officer vested with ample discretionary powers that the *demasias* were not excessive. Can it be said that under such conditions the grantee had at the date of the treaty a right, "an absolute right" (*Santa Fe case*, 165 U. S., 67), to demand title? If not, his claim is not within the provisions of the act of 1891.

74. And under the law of 1852 was his standing any better? Under that law he could secure no *demasias* however small without paying for them, and he could not secure even these without proof of his ability to stock them. If the *demasias* were more than a third of the legal area, he could get them only at public auction. Can it be for a moment contended that he had "an absolute right" to demand title to the *demasias* when his obtaining them at all was dependent, *first*, upon his

proofs as to ability to stock, and, *second*, upon the outcome of a public auction? Perhaps in the last he might have been outbidden, just as Bustillo was by Romero in 1821 in this case. Perhaps the price which would ultimately have resulted from this auction would have greatly exceeded the paltry sum which claimants so studiously tender in this cause. Indeed, the fact that the United States paid something like 34 cents an acre for the land which claimants in a spirit of inexplicable generosity now offer to pay less than 1 cent an acre for indicates that had the San Rafael grantees participated in an auction in 1853, as permitted by the law of 1852, they would have had to pay much more than their successors in title now seek to contribute to the public treasury; or, outbidden in the contest, those same successors in title might not now be before this court as the claimants of a princely domain for which neither the Mexican nor the American Government has ever received a cent.

75. This is not the character of claim that "the United States are bound upon the principles of public law or by the provisions of the treaty of cession to respect and permit to become complete and perfect if the same was not at said date already complete and perfect." (Subsection 1 of section 13 of the act of 1891.) That the United States is under no obligation, as a matter of public law, to recognize a grant as valid whose conditions remained unfulfilled at the date of the treaty is evident. It would be announcing a principle entirely unknown to international law to hold that

the grantee nation is bound to allow conditions unfulfilled at the date of cession to be fulfilled thereafter. While the Florida treaty contained a stipulation allowing a certain time after cession for the performance of conditions attached to grants (*Sibbald case*, 10 Pet., 321), this was a mere matter of contract. Had there been no such stipulation, under the rules of the international law there would have been no such right. This principle is recognized by this court in the *Cessna case* (169 U. S., 186) in discussing this very section of the act of 1891, when, after referring to the action of the commissioners on the treaty of Guadalupe Hidalgo in striking out article 10, it says:

> By the rejection of this article this Government distinctly declared that it did not propose to recognize any grants which were not at the time of the treaty of cession recognized by the Mexican Government as valid, or any whose conditions, either precedent or subsequent, had not been fully performed.

And thereupon adds:

> In this respect the action taken was in harmony *with the general rule of international law.*

If the United States is not bound upon principles of public law to respect such a claim, even less so is it by the provisions of the Gadsden treaty. This last subject has already been discussed, and upon it the Cessna case, just quoted, is very much in point.

76. No better conclusion can be found for this sub-

ject than the following quotation from the Ely case, at page 239:

> This Government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after. No duty rests on this Government to recognize the validity of a grant to any area of greater extent than was recognized by the Government of Mexico. If that government had a right, as we have seen in *Ainsa* v. *United States* it had, to compel payment for an overplus or resell such overplus to a third party, then this Government is *under no moral or legal obligation* to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for.

It is, accordingly, respectfully urged that under the authorities cited there can be no confirmation entered in this cause; none for the *demasias*, for the reason that this court has so held in at least four cases and because those decisions are right upon principle and upon authority; none for the quantity named in the titles, for the reason that claimants' petition was not filed in time, for the reason that a confirmation is barred by the limitations of the Gadsden treaty, and for the reason that the proceedings in this cause are void for lack of authority in the granting officer.

The claim should be rejected and the petition and crosspetition dismissed.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

WILLIAM H. POPE,
Special Assistant to the Attorney-General.

APPENDIX 1.

TRANSLATION OF EXPEDIENTE.

[Seal of the Treasury-General of the State of Sonora, Republic of Mexico. Year 1894.]

TESTIMONIO OF THE RANCHO CALLED "SAN RAFAEL DE LA ZANJA."

[A stamp of 50 cents. March 5, 1894.]

To the Treasurer-General of the State of Sonora:

I, Rochester Ford, a resident of Tucson, Territory of Arizona, representing Mr. Colin Cameron, respectfully beg leave to state that Mr. Colin Cameron, being the owner of the rancho "San Rafael de la Zanja," and not having the expediente of said rancho, and being under the necessity of possessing a copy of said expediente for his use and protection, I request that you send me a copy of said expediente, duly certified, for such uses as Mr. Colin Cameron may see fit to make thereof. I certify to act in good faith, etc.

ROCHESTER FORD.

Tucson, Arizona, March 5, 1894.

Government stamp in force for the two years 1820 and 1821. A seal which reads Carlos IV Hispaniarum Rex. D. G. A seal which reads Fernando VII. D. G. M. Years D. 1814, 1815. S. 3. Two reales. Another seal which reads Fernando VII. D. G. M. Years D. 1816, 1817. S. 3. Two reales. Another seal which reads Fernando VII. D. G. N. Years D. 1818, 1819.

S. 3. Two reales. Third seal, two reales, years eighteen hundred and ten and eighteen hundred and eleven. *To the governor intendente:*

I, Don Manuel Bustillo, a resident of the presidio of Santa Cruz, before your honor, with the proper respect and in due form of law, appear and say that having a considerable amount of stock and needing a tract of land suitable for their preservation, I denounce and ask leave to purchase at auction 3 sitios of land in the same presidio in which I reside and outside of the boundaries thereof, on the side of the north, and 1 sitio more for an "estancia" (stock ranch), in the place of the cajoncito, on the side of the east. Wherefore, I pray your honor that for the measurement of the said tract of land you be pleased to issue the necessary orders to the proper officers, and that the commissioner may take into consideration in its valuation that the tract of land asked for borders upon the country of the Apaches, who are constantly hostile.

I, therefore, pray your honor to be pleased to grant my petition, in which I shall receive favor and justice, swearing that I do not act in bad faith, and to whatever is necessary.

MANUEL BUSTILLO.

To the governor intendente.

ARIZPE, *July 19, 1821.*

The foregoing petition is presented and admitted without prejudice to the parties who may have a better right.

The commandant of the company of Santa Cruz will proceed to the measurement of the lands hereby registered, summoning the adjoining landowners, and appointing expert appraisers, who shall value the same impartially; publication to be made for thirty days, for

the purpose of soliciting bidders; and when all the necessary proceedings shall have been taken in the premises, the expediente shall be transmitted to this "juzgado privativo," for the necessary proceedings, in order that the corresponding title may issue thereon.

CORDERO.

ACT OF ACCEPTANCE.

SANTA CRUZ, *October 4, 1821.*

Don Manuel Bustillo, of this vicinity, having presented the foregoing decree, issued on the 19th of July, ultimo, by the señor governor intendente, Brigadier Don Antonio Cordero, I said that I accepted, as I at once did accept, the commission contained in the foregoing decree, whereupon I ordered that the party interested and the neighboring landowners be summoned, and accompanied by the necessary officers, who are named, I appoint to-morrow as the day for the commencement of the measurements of the four sitios for raising cattle in the place called La Zanja, as before stated. By this decree, which shall be made known to the parties interested, I, the commissioner, Don Simon Elias Gonzales, captain of the company of the presidio, thus provided, ordered, and signed with the assisting witnesses, as required by law, in the absence of a notary.

SIMON ELIAS GONZALES.

Asst. LORENZO SORTILLON.

Asst. RAMON ROMERO.

NOTIFICATION TO THE INTERESTED PARTIES.

On the same day, of the same month and year, I, the said commissioner, there being present Mr. Manuel Bustillo, as the interested party, and José Garcia

Manso, solicitor of the common property of the residents of this place, notified them and communicated to them the foregoing decree, which they understand, and they declared that they considered themselves summoned, the first as being a party concerned and the second because the lands solicited adjoined the ejidos (common lands) of this presidio. They signed with me and the usual witnesses in the usual form.

SIMON ELIAS GONZALES.
MANUEL BUSTILLO.
[RUBRICAS.]

Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

At the presidio of Santa Cruz, on the said fourth day of October, eighteen hundred and twenty-one, I, the said commissioner, in order to proceed to the measurement of the said land and to the appointment of officers, did appoint José Antonio Calvo as counter, Tomas Guana as notor, Felipe Jaramillo and Leandro Romero as measurers, all of this place, and they being present accepted the said appointments, and each one made oath separately, using the form by God, our Lord, and making the sign of the cross, well and faithfully to perform their duties, without any deception, fraud, or imposition, according to the best of their knowledge and understanding, and they signed with me and the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES.
ANTONIO CALVO.
TOMAS GUANA. [RUBRICAS.]

Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

APPOINTMENT OF OFFICERS; THEIR ACCEPTANCE AND OATH.

View and examination of the land. At the place de la Zanja on the fifth day of the month of October, one thousand eight hundred and twenty-one, I, the said commissioner, having repaired to the said place with the appointed officers and usual witnesses, ordered that first of all an inspection and examination of the land should take place by examining it in detail in all directions (meaning from south to north and east to west), and after a careful examination I found it to be a waste country wherein the valley was devoid of trees, with low places and table-lands completely dry, there being no running water upon them for irrigation. All of which I hereby certify with the usual witnesses in the usual manner in the absence of a notary.

SIMON ELIAS GONZALES.

Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

BEGINNING OF SURVEY.

On the said day, month, and year, I, the said commissioner for the purpose of commencing the survey of the four sitios for raising cattle denounced by Don Manuel Bustillo, of this vicinity, delivered a hempen cord, well twisted and stretched, to the officers appointed, and also a Castillian vara, on which cord there were measured and counted in my presence fifty usual varas, and this operation being concluded, a stake was attached to each end of said cord; and being at the central point as fixed by the denouncer, which point is named San Rafael, the petitioner asked that, since the place of Los Cajoncitos which is petitioned for has been recognized as being within the common lands of

the presidio (of Santa Cruz), it should be added to the three sitios for which he had petitioned, which request appeared just; whereupon the measurement was commenced, the line being run towards the north, in which direction were measured two hundred cords, which terminated on a mesa on the bank of an arroyo which runs towards the peñasco, at the foot of an oak tree, upon which was made a cross, and at the trunk of which a large pile of stones was placed as a sign for a monument. Returning to the center, there were measured two hundred cords towards the south, which terminated at the mouth of the Cañada of the Potrero, at the same point at which is found the monument of the common lands of this presidio on the side of the north. Returning to the center, there were measured and counted towards the east two hundred cords, which terminated beyond the said Cañada of the Potrero on a contiguous mesa, where a large pile of stones was placed as a sign for a monument, and returning to the center there were measured and counted towards the west one hundred and thirty-three cords for the reason that the sixty-seven cords required to make the two hundred cords could not be measured on account of the roughness of the tract of land; these were therefore estimated, the estimated lines terminating on a high mountain situated in the range of the Sierra de la Plomosa, almost southwest of the small hill called "El Caloso," the summit of which was taken to designate a monument. Whereupon, it being late in the day, the proceedings were suspended, to be resumed to-morrow. In witness whereof I make this entry in the proceedings, which are signed by me, the assisting witnesses, the officers

appointed who knew how to write, together with the interested party in the ordinary manner.

SIMON ELIAS GONZALES.
ANTONIO CALVO.
MANUEL BUSTILLO. [RÚBRICAS.]

Asst. LORENZO SORTILLON.
Asst. RAMON ROMERO.

CONTINUATION OF THE SURVEY.

At the said place of San Rafael, on the 6th day of the said month and year, I, said commissioner, together with the officers appointed, in order to make the corresponding cords of the lands measured on yesterday, went to the place at which the two hundred cords terminated on the north, from which monument we estimated, on account of the roughness of the tract of land, two hundred cords towards the east, which terminated above a spring known as "El Carricillo," at the point of the Sierra del Cobre (copper mountain), at which point a corner monument is to be placed. In the same manner two hundred cords were estimated, on account of the roughness of the tract of land, towards the west, to the foot of a red hill (cerro), which was designated as a landmark, which hill is seen through an open place between the Peñasco and the mountains (cerros) of Sonoita; from this point four hundred cords were estimated, towards the south, upon the Sierra de la Plomosa to a point beyond the pass of San Antonio, where there are two small mountains which designate the corner on the side of the west of the common lands of this presidio, and which point is to serve as a corner monument of these sitios; from this point there were measured and counted two hundred cords towards the east, the line terminating at

the monument on the northerly boundary of the said common lands (of the presidio) which is found at the mouth of the Cañada of the Potrero, from which point, continuing the square, there were measured two hundred cords toward the east, which terminated on the Jaralito, at the corner monument of the said lands of the presidio, from which point four hundred cords were estimated toward the north on account of the roughness of the tract of land which ended above the spring, El Carricillo, with which measurements was formed the square of the four sitios registered by Don Manuel Bustillo for raising cattle, and as such he accepted them; being informed that in due time he was to establish his boundaries with monuments of lime and rough stone as required by law; signing with me, the officers appointed who knew how to write, and the assisting witnesses in the ordinary form.

Simon Elias Gonzales.
Manuel Bustillo.
Asst. Lorenzo Sortillon.
Asst. Ramon Romero.

VALUATION AND APPRAISEMENT OF THE LAND.

Thereupon I, the said commissioner, in order to proceed to the appraisement of the lands surveyed by me in favor of Don Manuel Bustillo, situated at San Rafael de la Zanja, containing four sitios for raising cattle, said that I appointed, and I did appoint, as such appraisers Don Alejo Bedolla and Tomas Guana, which latter acted as notor in the survey, they having fully seen and examined the said tract of land in detail, and they being present I communicated to them the said appointment, which they accepted, and they made oath in due form by God our Lord, making the sign

of the cross, well and faithfully to perform their duties without any deception, fraud or imposition, and under said oath they unanimously declared that after the examination which they had made of the said land they find and appraise according to their consciences that three of the said sitios, which have permanent water, are worth sixty dollars each, and the fourth, which may be made of use by means of a well, is worth thirty dollars, according to their true knowledge and understanding, as they have sworn to appraise; and after I had read to them this document they affirmed and ratified its contents and Guana signed it with me in the absence of a notary, in the usual manner.

SIMON ELIAS GONZALES.
TOMAS GUANA.

[RUBRICAS.]

Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

DECREE ODRERING THE AUCTIONS TO BE PROCEEDED WITH.

At the presidio of Santa Cruz, on the tenth day of October, one thousand eight hundred and twenty-one, I, the said commissioner, in view of the foregoing proceedings of survey and appraisement of the lands of San Rafael de la Zanja, consisting of four sitios for raising cattle, said that they shall be put up at auction for thirty consecutive days in accordance with the laws established by higher authorities, admitting to said sales the bids and additional bids that may be made; and by these presents I thus decreed, ordered, and signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

FIRST AUCTION.

At the presidio of Santa Cruz, on the said day, in the said month and year, I, said commissioner, at the sound of the drum caused many individuals of this place to be assembled upon the public plaza, and ordered that, in presence of all the bystanders, Juan Antonio Rodriguez, who fills the office of public crier, should announce in a loud voice "the lands of the place called San Rafael de la Zanja, situate within this jurisdiction and containing four sitios for raising cattle, surveyed in favor of Don Manuel Bustillo of this town, appraised at two hundred and ten dollars, are for sale, on account of the public treasury; whoever wishes to make a bid, let him come and do so in due form before me, when his bid will be received;" and there being no bidder, I make this certificate of the fact and signed it with my usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

SECOND AUCTION.

At the same presidio, on the eleventh day of the said month and year, another like auction was held and with the same formalities as the former, and no bidders having appeared, I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

THIRD AUCTION.

At the said presidio, on the twelfth day of said month and year, another auction was held, like the

former, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

FOURTH AUCTION.

At the said presidio, on the thirteenth day of the said month and year, another auction was held like the former, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

FIFTH AUCTION.

At the same presidio, on the fourteenth day of the said month and year, another auction was held like the former ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

SIXTH AUCTION.

At the said presidio, on the fifteenth day of the said month and year, another auction was held like the former ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses, in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

SEVENTH AUCTION.

At the same presidio, on the sixteenth day of the said month and year, another auction was held like the former ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses, in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

EIGHTH AUCTION.

At the said presidio, on the seventeenth day of the said month and year, another auction was held like the former ones, and no bidder having appeared I made this certificate, which I signed in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

NINTH AUCTION.

At the said presidio, on the eighteenth day of the said month and year, another auction was held in the same form as the former ones, and no bidders having appeared I made this certificate, which I sign with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

TENTH AUCTION.

At the said presidio, on the nineteenth day of the said month and year, another auction was held like the preceding ones, and no bidder having appeared I made

this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

ELEVENTH AUCTION.

At the said presidio, on the twentieth day of the said month and year, another auction was held in the same form as the preceding ones, and no bid being made I made this certificate, which I signed with my usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWELFTH AUCTION.

At the said presidio, on the twenty-first day of the said month and year, another auction was held like the preceding ones, and no bidder having appeared I made this certificate, which I signed with my usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

THIRTEENTH AUCTION.

At the said presidio, on the twenty-second day of the said month and year, another auction was held in the same form as the preceding ones, and no one having offered a bid I made this certificate, which I signed with my usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

FOURTEENTH AUCTION.

At the said presidio, on the twenty-third day of the said month and year, another auction was held with the same formalities as the preceding ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

FIFTEENTH AUCTION.

At the said presidio, on the twenty-fourth day of the same month and year, another auction was held with the same formalities as the preceding ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LOZENZO SORTILLON.
Witness: RAMON ROMERO.

SIXTEENTH AUCTION.

At the said presidio, on the twenty-fifth day of the said month and year, another auction was held like the preceding ones, and no bid having been offered I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]
Witness: LORENZO SORTILLON.
Witness: RAMON ROMERO.

SEVENTEENTH AUCTION.

At the said presidio, on the twenty-sixth day of the said month and year, another auction was held like the

preceding ones, and there being no bid offered I made this certificate, which I signed with my usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

EIGHTEENTH AUCTION.

At the said presidio, on the twenty-seventh day of said month and year, another auction was held in the manner as the former ones, and no bid having been offered, I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

NINETEENTH AUCTION.

At the same presidio, on the twenty-eighth day of the said month and year, another auction was held like the former ones, and no bid having been offered, I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTIETH AUCTION.

At the said presidio, on the twenty-ninth day of the said month and year, another auction was held in the same manner as the preceding ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

October 29, 1821. Being obliged to report at the capital of Arizpe by order of my superiors in matters of public service, this expediente shall be delivered in its present state to the commandant pro tem., ensign José Pesqueira, in order that he may proceed to hold the remaining ten auctions; that upon their conclusion he shall proceed to receive the testimony as to the ability of the interested party, and forward the same to the intendencia of the province with a summons to the party concerned. In witness whereof I have signed this in the said month and year with the usual witnesses according to law.

SIMON ELIAS GONZALES. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-FIRST AUCTION.

At the said presidio, on the thirtieth day of the said month and year, another auction was held in the same manner as the preceding ones, and there was no bidder; wherefore I made this certificate in accordance with the charge entrusted to me for this purpose, as appears from the foregoing documents, and I signed it with the usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-SECOND AUCTION.

At the said presidio, on the thirty-first day of the said month and year, another auction was held in the same form as the preceding ones, and no bidder hav-

ing appeared, I made this certificate, which I signed with the usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-THIRD AUCTION.

At the said presidio, on the first of November of the said year, another auction was held, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-FOURTH AUCTION.

At the said presidio, on the second day of said month and year, another auction was held in the same form as the preceding ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-FIFTH AUCTION.

At the same presidio, on the third day of the said month and year, another auction was held in the same form as the preceding ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

JOSÉ PESQUEIRIA. [RUBRICAS.]

WITNESS: RAMON ROMERO.

WITNESS: LORENZO SORTILLON.

TWENTY-SIXTH AUCTION.

At the said presidio, on the fifth day of the said month and year, another auction was held in the same form as the preceding ones, and no bidder having appeared I made this certificate, which I signed with my usual witnesses in the ordinary form.

JOSÉ PESQUEIRIA. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-SEVENTH AUCTION.

At the said presidio, on the fifth day of the said month and year, another auction was held in the same form as the preceding ones, and no bidder having appeared I made this certificate, which I signed with my usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICA].

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-EIGHTH AUCTION.

At the said presidio, on the sixth day of the said month and year, another auction was held like the preceding ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TWENTY-NINTH AUCTION.

At the same presidio, on the *sixth* day of the said month and year, another auction was held in the same form as the preceding ones, and no bidder having

appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

José Pesqueira. [rubricas.]

Witness: Lorenzo Sortillon.

Witness: Ramon Romero.

THIRTIETH AUCTION.

At said presidio, on the eighth day of said month and year, another auction was held like the former ones, and no bidder having appeared I made this certificate, which I signed with the usual witnesses in the ordinary form.

José Pesqueira. [rubricas.]

Witness: Lorenzo Sortillon.

Witness: Ramon Romero.

ORDER FOR INTERESTED PARTY TO FURNISH PROOF OF HIS ABILITY TO STOCK THE LANDS.

At the presidio of Santa Cruz, on the ninth day of said month and year, I, the said commissioner, in view of the fact that the measurements, appraisement, and offers of sale were concluded, and that only the proof of the interested party's ability to stock the land was lacking, such proof to be furnished by three witnesses, as provided by law, ordered that said party be notified to produce said witnesses in order to proceed to hear said testimony. In witness whereof I make this certificate, which I signed with the usual witnesses in the ordinary form.

José Pesqueira. [rubricas.]

Witness: Lorenzo Sortillón.

Witness: Ramón Romero.

NOTIFICATION.

Immediately thereupon, Don Manuel Bustillo being present, I communicated to him the foregoing order, and in consequence thereof he presented the witnesses he is asked to produce, and he signed this with me and the usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: LORENZO SORTILLON.

Witness: RAMON ROMERO.

TESTIMONY OF FIRST WITNESS.

At the presidio of Santa Cruz, on the ninth day of said month and year, I, the said commissioner, in order to comply with the foregoing order, and Don Manuel Bustillo having presented as a witness the sergeant of this company, Dolores Jacome, caused the latter to make oath, which oath he took by God our Lord, and making the sign of the cross, by virtue of which oath he promised to tell the truth about what he might know that would be asked him; and being asked if the said Don Manuel Bustillo has the ability to stock the place San Rafael de la Zanja which he has registered for raising cattle, he (the witness) said that he knows and states that he (Bustillo) has at the present time a considerable number of cattle and horses with which to stock the said land; that this is all he knows and can tell about this matter; that it is true, under the oath he has taken, and when this declaration was read to him he affirmed it and ratified it. He stated that he is forty-five years of age and a competent witness, and signed with me and the usual witnesses in the absence of a notary in due form of law.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: YGNACIO PRAGEDIS CARRILLO.

Witness: RAMON ROMERO.

TESTIMONY OF SECOND WITNESS.

At the said presidio, on the said day of the said month and year, I, the said commissioner, caused the oath to be administered in due form to Ygnacio Medina, the second witness presented by Don Manuel Bustillo, who promised to tell the truth about what he might know that would be asked him; and being asked if the said Bustillo has the ability to stock the place San Rafael de la Zanja, which he has registered for raising cattle, he said that he knows and states that he (Bustillo) has placed upon said land a considerable number of cattle and horses with which said land is stocked; that this is all he knows in the matter; that it is the truth under the oath he has taken; and when this declaration was read to him he affirmed and ratified it. He stated that he was forty years of age, and signed with me and the usual witnesses with whom I act in the absence of a notary, according to law.

José Pesqueira.

Ygnacio Medina. [rubricas.]

Witness: Ygnacio Pragedis Carrillo.

Witness: Lorenzo Sortillón.

TESTIMONY OF THIRD WITNESS.

At the said presidio, on the said day of the said month and year, Don Manuel Bustillo, having presented the third witness, José Antonio García, an invalid of this company, I, the said commissioner, caused the latter to take the oath by God our Lord and the sign of the cross, under which oath he promised to tell the truth about what he knew so far as he might be asked, and being asked if the said Bustillo has the ability wherewith to stock the place San Rafael de la Zanja, which he has registered for raising cattle, he

said that he states that he (Bustillo) has placed upon the said land a considerable number of cattle and horses with which he has stocked it; that this is all he can tell and all he knows about the matter, and that it is the truth under the oath which he has taken; and when this declaration was read to him he affirmed and ratified it. He stated that he was fifty-four years of age and a competent witness, and as he did not know how to write, I signed for him with the usual witnesses as provided.

José Pesqueira. [rubricas.]

Witness: Ygno. Pragedis Carrillo.

Witness: Lorenzo Sortillon.

WRIT SHOWING THAT THIS EXPEDIENTE IS CONCLUDED, AND TRANSMITTED TO THE GOVERNMENT WITH SUMMONS TO THE INTERESTED PARTY.

At the presidio of Santa Cruz, on the twelfth day of the said month and year, I, the said commissioner, had to order, and did order, that this expediente, being now concluded, be forwarded to the intendente of the province, and that the interested party be summoned to appear in the capital of Arizpe and be present at the last three auctions and final sale of the said lands, which has to take place before the commission established in that capital. In witness whereof I signed this with the usual witnesses in the ordinary form.

José Pesqueira. [rubricas.]

Witness: Ygno. Carrillo.

Witness: Lorenzo Sortillon.

NOTIFICATION.

At the said presidio, on the same day of the same month and year, I, the said commissioner, Don Manuel Bustillo being present, notified him of and

communicated to him the foregoing order, and he declared himself summoned to the final sale which is to take place at the capital of Arizpe, and signed with me and the usual witnesses in the ordinary form.

JOSÉ PESQUEIRA. [RUBRICAS.]

Witness: YGNACIO CARRILLO.

Witness: LORENZO SORTILLON.

MEMORANDUM.

On the fourth day of December, one thousand eight hundred and twenty-one, a report of this expediente, made upon twelve sheets of legal paper, was forwarded to the intendente of the province, to which I hereby certify. (Rubrica.) I transmit to your honor the expediente of lands registered in this presidio by Don Manuel Bustillo, having summoned the interested party to their final auction, to which you refer in your favor of the 17th instant, which I hereby answer. May God protect you many years. Santa Cruz, November 30, 1821. To the intendente pro tem., Don Ygnacio de Bustamante.

JUAN ALEJO CARRILLO.

Arizpe, December 11, 1821. To the Promotor Fiscal (Attorney-General).

BUSTAMANTE. [RUBRICA.]

Señor Intendente Interino:

The promotor fiscal (attorney-general) of this intendencia has carefully examined this expediente of lands surveyed in favor of Don Manuel Bustillo, a resident of the presidio of Santa Cruz, by the commissioner Don Simon Elias Gonzales, captain and commandant of said presidio, in the place named San Rafael de la Zanja in the same jurisdiction, from which there resulted

four sitios for raising cattle and horses, which were appraised by two experts appointed for that purpose at sixty dollars for three of them, because they contain running water, and the fourth at only thirty dollars, because it has need of water and can be benefitted only by a well, which two sums make two hundred and ten dollars, and having offered them at public auction for thirty consecutive days, no one offered more than the said appraisement. Whereupon the testimony of three witnesses was taken, which showed that the petitioner, Bustillo, possessed means to stock said tract of land. The promotor fiscal therefore asks you to cause the three public offers of sale to be made at public auction in this capital, inviting bidders and selling the tract of land at the highest possible price, the purchaser to be notified that he is to pay into this national treasury the total value of said lands, their half yearly tax, eighteen per cent express charges, two per cent general impost, and the three dollars for the officers of the abolished contaduria (auditor's office): the necessary certificate showing that these payments have been made to be issued and attached to the expediente, advising the superior junta of the same, that it may take such steps as may be deemed proper. This is my opinion, subject, however, to your determination.

Arizpe, December 20, 1821.

FRANCISCO PEREZ.

Arizpe, January 7, 1822. In accordance with the foregoing report of the promotor fiscal of this intendencia, the three public auctions, in the usual form, shall be proceeded with to accomplish the final sale mentioned in this expediente, the interested parties having first been summoned. The intendente pro tem.

thus decreed and ordered it, signing with the usual witnesses in the absence of a notary.

BUSTAMANTE. [RUBRICA.]

Witness: JOSÉ MARIA MENDOZA.

Witness: JOAQUIN ELIAS GONZALES.

[RUBRICAS.]

Immediately thereafter, Don Manuel Bustillo being present, the foregoing answer from the treasury and the order resulting therefrom were so communicated to him, and he acknowledged the communication and signed it with the intendente and the usual witnesses.

BUSTAMANTE.

MANUEL BUSTILLO. [RUBRICAS.]

Witness: JOSÉ MARIA MENDOZA.

Witness: JOAQUIN ELIAS GONZALES.

FIRST AUCTION.

At the city of Arizpe, on the eighth day of the month of January, one thousand eight hundred and twenty-two, there being assembled as a commission of auctions the intendente pro tem. as president, and the members who compose it, in order to hold the first of the auctions of which these proceedings speak, they caused to be assembled at the office of this intendencia at the sound of the drum many individuals, and ordered the public crier, Loreto Salcido, to proclaim in their presence in a loud and clear voice the following, which said crier did so proclaim, saying: "There are going to be sold for this commission of auctions four sitios of public lands for cattle raising, comprised in the place named San Rafael de la Zanja, situated within the jurisdiction of the presidio of Santa Cruz, surveyed in favor of the one who denounced them, Don Manuel Bustillo, and appraised in the sum of two hundred and

ten dollars, being at the rate of sixty dollars each for three of said sitios and the remaining one at thirty dollars. Whoever wishes to make a bid upon said public land, let him come forward and make his bid in due form before this commission, and every bid regularly made will be received, with the understanding that at the third and last auction, which is to be held the day after to-morrow, the final sale will be made to the highest bidder." At this time appeared Don Ramon Romero, who for himself and in the name of the inhabitants of the said military post of Santa Cruz, bid ten dollars above the appraised value, whereupon Don Manuel Bustillo immediately overbid the former. After that they went on bidding against each other alternately until the last bid ran up to one thousand two hundred dollars, made by Don Ramon Romero. Twelve o'clock of this day having now struck without a higher bidder having appeared, these proceedings were closed. In witness whereof the president and members of this commission of auctions signed.

BUSTAMENTE.
ESCALANTE.
FUENTES.
PEREZ.
[RUBRICAS.]

SECOND AUCTION.

At the same city, on the ninth day of the said month and year, was held the second auction of the lands spoken of in this expediente, in the same manner as the preceding one, with this difference only: That the public was notified that Don Ramon Romero, for himself and in the name of the residents of Santa Cruz, had made a bid of one thousand two hundred dollars. As no other

bidder appeared, this certificate was made and signed by the gentlemen composing the said commission.

BUSTAMANTE.
ESCALANTE.
FUENTES.
PEREZ. [RUBRICAS.]

THIRD AUCTION.

At the city of Arizpe, on the tenth day of the month of January, one thousand eight hundred and twenty-two, there being assembled as a commission of auctions the president and members composing the same in order to hold the last auction for the final sale spoken of, an offer of sale was made by Loreto Salcido, like in everything to the one of the preceding second auction, with this difference only, that the public was notified that this would be the last and final sale. Whereupon there appeared only the said Don Ramon Romero, repeating his bid of one thousand two hundred dollars for the said lands, and twelve o'clock of this day having struck without a higher bidder appearing, the crier said for the last time: "For the first time, for the second, for the third time: to be sold, to be sold, to be sold; going, going, gone, to Don Ramon Romero and the residents of the presidio of Santa Cruz." Thus this transaction was concluded, by which were solemnly sold the four sitios of public land which comprise the place named San Rafael de la Zanja, spoken of in these proceedings, in favor of the said Romero and residents of Santa Cruz, for the sum of one thousand two hundred dollars. In witness whereof this certificate was

made and signed by the interested party and the president and members of this commission of auctions.

BUSTAMANTE.
ESCALANTE.
FUENTES.
PEREZ.
RAMON ROMERO. [RUBRICAS.]

Arizpe, January 10, 1822, this expediente is to be forwarded, together with the attestation which contains the decisions of the higher officers in the matter, to Don Ramon Romero, in order that he may within three days proceed to take the necessary steps in the matter, giving the name of a suitable and experienced person in the City of Mexico who may be entrusted with bringing the matter before that court. The intendente pro tem. so ordered it and signed with the usual witnesses in the absence of a notary.

BUSTAMANTE. [RUBRICA.]
Witness: JOSÉ MA. MENDOZA.
Witness: JOAQUIN ELIAS GONZALES.
[RUBRICAS.]

Memorandum.—This day the expediente was delivered upon sixteen legal sheets in the terms provided.

To the intendente pro tem.:

Don Ramon Romero, for himself and for the residents of the presidio of Santa Cruz, appears before you, saying: I shall make prompt and true restitution of this expediente and of the attestation which has been delivered to me separately, and I proceed to state that, all these matters now being arranged in accordance with the decrees of the superior offices who rule in the premises, as embraced in said attestation, I am well satisfied with all the proceedings up to their actual state of sale;

and I therefore request that your honor will command the prompt progress of this expediente up to its final conclusion, in order that upon its approval by the superior junta of the treasury the corresponding title of sale and confirmation in our favor may be issued to the lands of San Rafael de la Zanja, of which these proceedings treat. We are ready to appoint in Mexico a suitable and experienced person to attend the matter in that capital city. Therefore, I request your honor to grant this my petition, in doing which you will confer a favor upon me and the parties whom I represent. I swear, &c.

RAMON ROMERO. [RUBRICA.]

DECREE.

In the city of Arizpe, on the 11th day of the month of January, 1822, the señor intendente *ad interim* of this province of Sonora and Sinaloa, Don Ygnacio de Bustamante, having examined the foregoing proceedings of suvey, appraisement, offers, auctions, and sale of the four sitios of royal lands for raising cattle, comprehended in the place called San Rafael de la Zanja, in the jurisdiction of the presidio of Santa Cruz, and sold to Don Ramon Romero and other citizens of that military post; in view also of Romero's written answer, and all other matters necessary to be considered, he declared that said proceedings were in all respects regular and sufficient, and considering that the said Don Ramon Romero and citizens of Santa Cruz are debtors to the national treasury for the said tract of land, hē had notified him (the said Romero) to pay into the public treasury of this city the sum of $1,297 6 reales and 5 grains in the following manner: $1,200, the amount for which this intendency sold said land; $70 6 reales

and 5 grains as the half yearly impost, besides its eighteen per cent; $24, as a two per cent general impost, and the remaining $3 as an impost of the abolished auditor's office of this treasury. As soon as these payments shall be made, and the corresponding certificate thereof attached to this expediente, the same shall be forwarded to the superior junta de hacienda for its approval, or such action thereon as may be deemed proper. Thus ordered, decreed, and signed with the assisting witnesses in the absence of a notary.

YGNACIO DE BUSTAMANTE. [RUBRICA.]
Witness: JOSÉ MARIA MENDOZA.
Witness: JOAQUIN ELIAS GONZALES.
[RUBRICAS.]

Immediately thereupon, Don Ramon Romero being present, he was personally notified of the foregoing order, and he declared himself so notified and signed with the intendente pro tem. and the usual witnesses.

BUSTAMANTE.
Witness: JOSÉ MARIA MENDOZA.
Witness: JOAQUIN ELIAS GONZALES.
[RUBRICAS.]

Provisional Junta of the National Treasury and Arizpe, January 11, 1822. Approval. The four sitios of land for raising cattle, comprehended in the place called San Rafael de la Zanja, situate within the jurisdiction of the presidio of Santa Cruz, are hereby declared to be legally, publicly, and solemnly sold in favor of Don Ramon Romero and other residents of the same military post, for the sum of one thousand two hundred dollars. And in consequence thereof this expediente shall be transmitted to the superior junta of the treasury in accordance with the order issued by this

intendencia in its former decision. Thus the gentlemen of this provisional junta unanimously decreed and signed.

BUSTAMANTE.
ESCALANTE.
FUENTES.
PEREZ. [RUBRICAS.]

To the intendente, lieutenant treasury, contador ad interim, promotor fiscal.

Arizpe, January 11, 1822. The decision of the provincial junta given in their meeting of to-day shall be complied with.

BUSTAMANTE. [RUBRICA.]

The principal ministers of the national treasury of Arizpe and its province. We certify that on folio 3d of the manual book of the present year the following entry is found:

Half yearly tax of lands. January 11, Don Ramon Romero, acting for himself and for the other citizens of the presidio of Santa Cruz, has paid $1,297, 6 reales, 5 grains, in the following manner: $1,200 as the price for which this intendencia has sold him the four sitios of royal land for raising cattle, which comprehend the place called San Rafael de la Zanja, situated in the jurisdiction of the said presidio; $70, 6 reales, 5 grains, as the half yearly tax and its 18 per cent express charges to Spain; $24 as the two per cent of general imposts, and the remaining $3 as a tax of the extinguished auditor's office of this treasury, as

is explained by the official note of this intendencia marked—

No. 1 ..... $1,297.-6-5

ESCALANTE.
FUENTE.
RAMON.
ROMERO.

In witness whereof we give this certificate at Arizpe on the 11th of January, 1822.

TOMAS DE ESCALANTE.
MIGUEL MA DE LA FUENTE. [RUBRICAS.]

The title on this expediente was issued on May 15, 1825, in favor of the interested parties, Don Ramon Romero and other residents of Santa Cruz (rubricas E. R. Pa. 7 a. vuelta. Notification. Vale.)

This is a true and legally copied testimony of the original title or matrix which exists in the archives of this treasury-general; it is corrected and compared upon these twelve sheets of paper, provided with the corresponding stamps. It is to be added that all the sheets which compose the original matrix consist of duly stamped paper. Authorized and sealed by me in the city of Hermosillo, the capital of the State of Sonora, Mexico, on the ninth day of the month of March, one thousand, eight hundred and ninety-four.

V. AGUILAR.

Rafael Yzabal, the constitutional vice-governor of the State, exercising the executive power: I certify that Don Victor Aguilar is, as his title says, the treasurer-general of the State of Sonora, and that the above is his signature.

Hermosillo, March 13, 1894.

RAMON CORRAL, *Secty*
RAFAEL YZABAL.

Victor Aguilar, treasurer-general of the State of Sonora, Republic of Mexico: I certify that the book of Toma de Razon for the year 1825 is not in existence, and that the signatures which are affixed to the original matrix and documents of the ranch called "San Rafael de la Zanja" are genuine, and therefore worthy of full faith and credit.

In witness whereof I issue this certificate in the city of Hermosillo on the ninth day of the month of March, one thousand eight hundred and ninety-four.

V. AGUILAR.

Office of the treasurer-general of the State of Sonora. Certificate of payment No. 232. I certify that Mr. Bartolome Rochin paid into this office the sum of $5.20, including the 30 per cent Federal fee for the attestation made by the governor of the State to the signature of the treasurer-general of the same.

Hermosillo, March 9, 1894.

THE TREASURER-GENERAL.

V. AGUILAR.

APPENDIX 2.

LAW NO. 197, OF THE STATE OF SONORA, MAY 14, 1852.

The acting governor, in the exercise of the supreme executive power of the State of Sonora, to all its habitants:

Know ye: That the Congress of the United States has decreed what follows:

Number 197.

The Constitutional Congress of the State of Sonora decrees the following law on surveying:

Article 1. The governor of the State is authorized to appoint two surveyors who shall be graduates, and, as long as these can not be obtained without advancing funds from the public treasury, to appoint two practical surveyors of known attainments, with authority to proceed both with the survey of the vacant public lands of the State as well as with the resurvey of those which, through denouncement or in the judgment of said surveyors or that of the treasury, may be defective.

2. *Demasias* are considered to be those that may be found within the true outboundaries of the grant titles, and they shall be excessive when they amount to the third part of the land which said titles may contain.

3. When the said *demasias* are not excessive, and the possessors apply for them with proof of having sufficient means for stocking them, they shall be adjudicated to them without public auction at the rates in

force at the present time. If they should not want them, they shall be adjudicated to denouncers in like manner. Should they be excessive they shall be sold to the highest bidder.

4. The possessors, within the general area of their titles, may select the principal land that may best suit them, provided they leave the *demasias* regularly united in one body in order that the treasury may alienate them to advantage.

5. In addition to the emoluments treated of in articles 66, 67, and 69 of the organic law of July 11, 1834, the surveyors shall be entitled to those which article 77 of said law assigns to them.

6. The assistants shall receive one dollar per day only for the time they may be employed in the survey, and they shall be paid by the locators or denouncers or by the public treasury, when the survey has not been previously petitioned for by some party and is begun by direction of the treasury only, for which expenditure it shall be reimbursed by charging it to the person to whom the lands surveyed may be adjudicated.

7. The surveyors themselves are empowered to take proofs for the identification of the boundaries in the event that the identity thereof can not be clearly ascertained from the titles.

8. They are also empowered, when they notice that the principal lands they may resurvey have not been appraised in conformity to the laws in force at the dates of their original surveys, to appraise them anew according to those same laws, giving timely notice to the treasury in order that it may cause the difference to be paid into the coffers of the exchequer, and may issue to the owner the certificate of payment, which it shall attach to his grant title.

9. The challenging of surveyors, whether they be practical surveyors or graduates, shall not be permitted. The party who may feel himself aggrieved has the right to allege the incorrectness of the survey, applying to the treasury within one month in order that it may appoint the other surveyor, or for lack of him a person of practical knowledge and who enjoys its confidence, who shall execute the resurvey that is questioned, at the expense of the responsible party, that is to say, at the expense of the surveyor, if the survey he made should prove to be in fact incorrect, or at that of the complainant, if it should not be; the decision of which shall be made by the treasury after examining the two *expedientes* that have been made up, and the opinion of the attorney-general of the treasury. For the last resurvey the prior surveyor must be summoned as a party in interest.

10. The surveyors are under obligation to notify the nearest authorities as to those lands that are not properly monumented, in order that they may cause the possessor to pay the fine of twenty-five dollars established by article 63 of the organic law. These fines shall be placed on deposit in the proper collector's office, the surveyor taking a certificate with which he shall make report to the treasury itself, in order that it may cause the fine to be paid in. The authorities also shall notify the said treasury.

11. The original *expedientes* of the lands surveyed that may be in the possession of the parties in interest they shall send to the treasury within one hundred days from the publication of this law, appearing personally or by authorized and paid attorneys to confirm their possessions. Those who may not do so shall have no right at any time to the adjudication without public auction. The ten years' possession which might be

acquired by that means does not constitute the title by just prescription treated of in the royal order of June 8, 1814, but rather those who may permit the one hundred days to pass without a cause entirely legal and justified shall lose by the very act the costs of their surveys and *expediente*, to be applied to the public treasury, if the lands are sold or adjudicated to another person, and if to the possessors themselves, they shall pay a fine of fifty dollars on account of the presumption of malicious concealment; all this without prejudice to the rental established by article 6, of law No. 51, of May 12, 1835.

12. The same one hundred days of article 11 are fixed for the commissioners to discharge the commissions they may have up to the publication of this law, and the two hundred days for those that may have related to lands on the frontier; the surveys that might be made subsequently being null and of no value, unless made by surveyors or under the provisions of article 9. But, if the surveyors should be at a great distance and there should be any petition relative to lands, the treasury may, to avoid prejudices, appoint special commissioners.

13. The treasury may appoint one more temporary clerk for dispatching the land business as the increase of work may require, fixing his compensation for the same at one dollar for each day's labor.

14. In order that no one may allege ignorance of this law, it shall be published twice in the first month, not only in the official newspaper, but also in each town of the State, to the sound of a drum and with all the formality possible by the proper authorities, which through the usual channels shall give notice of its publication, and the proofs thereof shall of necessity remain in the treasury for the consequent purposes,

with the understanding that if through neglect of the authorities the parties through ignorance of the law should take exception to the responsibility which its respective articles impose upon them, the authorities shall have imposed upon them a fine of a value equivalent to that which through their fault may have failed to be paid into the coffers of the exchequer.

15. There is repealed by this law the State law, number 121, of January 26, 1850, and article 68 of the organic law of the treasury of July 11, 1834.

The governor of the State shall direct that it be printed, published, and circulated, and that due compliance be given thereto.

Ures, May 14, 1852.

RAMON ENCINAS,
Deputy and President.

RAFAEL BUELNA,
Deputy and Secretary.

JOSÉ MARIA H. DE OSCOBOZA,
Deputy and Secretary.

Wherefore I command that it be printed, published, and circulated, and that due compliance be given thereto.

Palace of the State Government at Ures, May 14, 1852.

FERNANDO CUBILLAS.

JOAQUIN V. ELIAS,
Secretary.

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In the Supreme Court of the United States

OCTOBER TERM, 1901

THE UNITED STATES, APPELLANTS,
v.
A. A. CHAMPEAU ET AL.

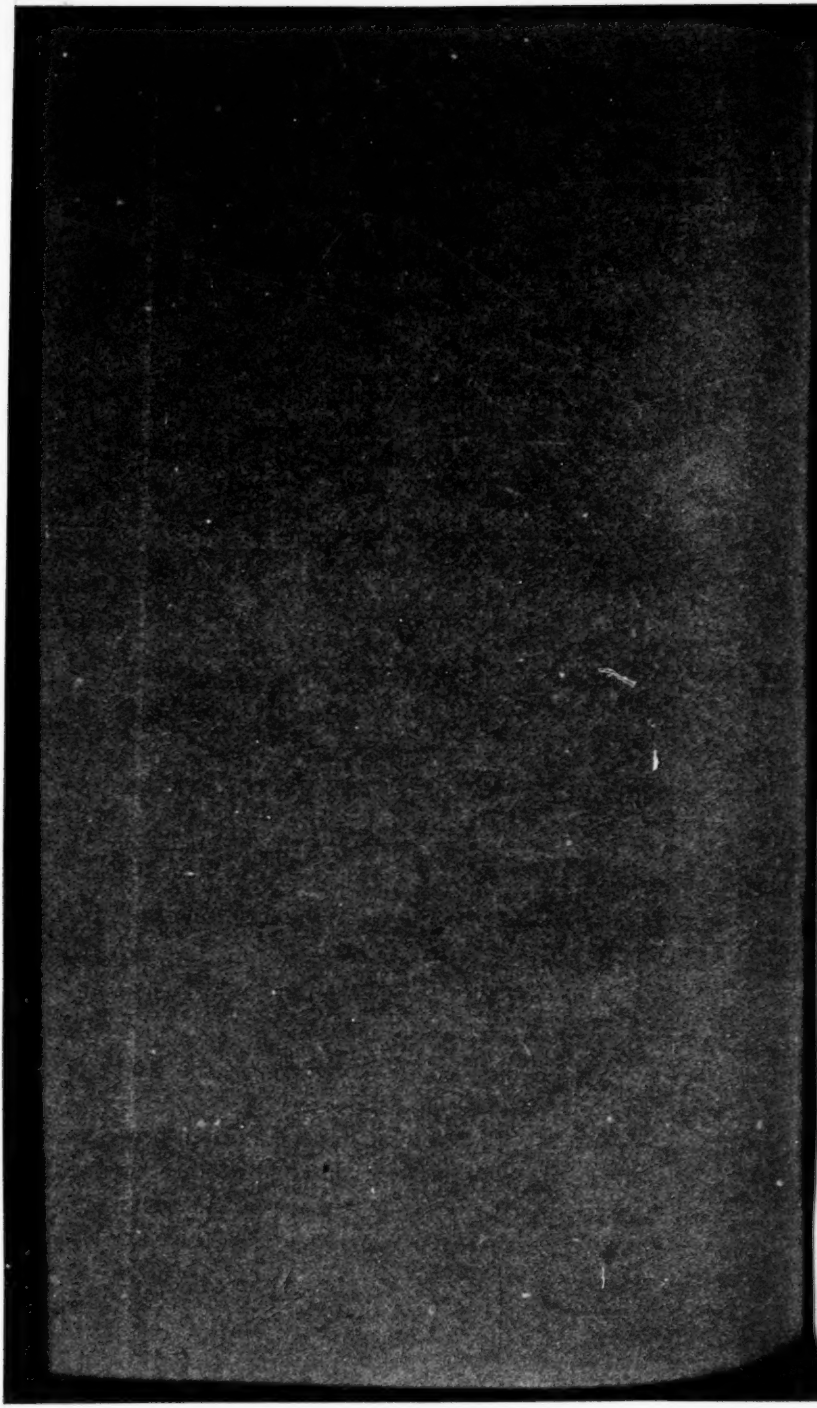
HARVEY A. CHAMPEAU AND CARRIE CHAMPEAU, APPELLANTS
v.
THE UNITED STATES.

No. 232.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

ADDITIONAL BRIEF FOR THE UNITED STATES.

INCLUDING SONORA LAW NO. 11 OF MAY 18, 1826.



In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT, *v.* A. A. GREEN ET AL. — No. 109.

HARVEY L. CHRISTIE AND COLIN Cameron, appellants, *v.* THE UNITED STATES. — No. 129.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

ADDITIONAL BRIEF FOR THE UNITED STATES.

INCLUDING SONORA LAW NO. 51 OF MAY 12, 1835.

1. Much has been said upon the argument of this cause as to Sonora state law No. 51, bearing date of May 12, 1835. That law translated in full is as follows:

> The constitutional congress of the State of Sonora decrees the following:
>
> ART. 1. Those who have acquired property in lands of the state by lawful title are holders in good faith (*poseedores en buena fe*), even when they have lost that document, for they are en-

titled to revalidate it upon proof of the incident that may have occurred.

ART. 2. So also are those who, under the boundaries set out in their proceedings of survey, occupy any overplus of lands to which they are always entitled, even when the overplus is shown, without other obligation than to pay for the excess according to the quality of the land and at the price that governed when it was surveyed and appraised; and only in case the holder does not need the overplus or when this latter is very excessive in the opinion of the Government, based on the report of the Treasury, shall it be adjudicated to whoever denounces or applies for it, who shall also be responsible for the resurvey, if no excess should be found. In lands measured by estimation, excess or deficiencies shall not be so considered when they do not exceed half a sitio.

ART. 3. The right of lawful possession is not lost because the land is deserted or abandoned provided it is caused by the hostilities or incursions of the enemy, as long as they last.

ART. 4. They are likewise holders in good faith who have obtained land by legal tradition. Those are reputed as such who have paid into the depositories of the public treasury the proper value thereof, and likewise all those who prove occupation in good faith, which must be respected even when the dominion of the possession is afterwards adjudicated to another person by disposition of the laws that govern in the matter.

ART. 5. In all the cases specified in the foregoing articles, and in others of like nature that

occur, when occupation in good faith is shown the holders have the right to dispose of their properties, or to be indemnified by the new occupants of the land for the essential improvements they may have made thereon. This shall be done by just appraisement by good and impartial men, and by a third in discord, appointed by the parties, and bound by an oath before the local authorities, under which understanding the bidders for land denounced by virtue of decree No. 10 of May 30, 1834, shall enter the bidding.

ART. 6. All who have arbitrarily occupied or occupy lands belonging to this State are reputed holders in bad faith, as are also those who, having allowed the various extensions of time given for legalizing their possessions to pass, have not paid their proper value into the treasury in time, and still continue to defraud the State of its dues, with malicious and culpable dissimulation. Upon proof of such reprehensible conduct, not only do the holders in bad faith become liable to lose the lands, and improvements they have made, but they shall thereafter be liable besides to a rental of 5 per cent of the value of the land for each year of arbitrary occupation.

Therefore I order it printed, published, circulated, and duly complied with.

Arizpe, May 12, 1835.

IGNACIO DE BUSTAMENTE.

JOSE MARIA FELIX,
Chief Clerk.

2. This law has been fully discussed in the brief heretofore filed for the Government (pp. 202 et seq.).

The attention of the court is recalled especially to the fact that this law does not declare the occupant to be the *owner*, but simply defines the character of his *possession* as being "in good faith." The importance of "good faith" as an element of possession in determining prescriptive rights as between private parties is pointed out in *Hayes* v. *United States* (170 U. S., 650). It was this element that this law added to the possession of the overplus lands (demasias). So far from investing the possession with ownership, the whole purport of the law is to the contrary, especially when construed with the law of 1852 and subsequent legislation on the same subject.

3. The limitation of four sitios imposed on the granting power by the law of February 14, 1805, has been already discussed in the principal brief (p 161). The land here involved had been petitioned for by *one* person, the amount had been surveyed in view of its being for *one* person, the advertisements had been of a tract sought by *one* person, and it was not until the very last steps in the proceeding—when the land was being auctioned off—that Romero, acting for himself and others whose names are not developed by the titles, bid off what had been sought by Bustillo, and by stepping into Bustillo's shoes bought what he wanted. But these shoes were of the *four-sitio size;* Bustillo's petition made them such; the law made them such. They could not be stretched to ten times their legal size by the fact that Romero had a number of associates. They in the aggregate might take only

what Bustillo could have gotten. If these various persons desired to secure land on their own account they must do it by denouncement proceedings instituted by them, not by stretching that instituted and prosecuted by Bustillo. The suggestion was made in the argument that in Perrin's case (171 U. S., 292) a grant of eight sitios was upheld.

In Perrin's case, however, the procedure was under the Sonora State law of May 20, 1825, which in terms permitted, under some circumstances, a grant of more than four sections, depending on the discretion of the treasurer-general. (Sec. 21, 22 Reynolds, p. 130.) In Perrin's case, also, there were more than one denouncer. Here, however, the title was consummated prior to the law of May 20, 1825, and is governed, not by that law, but by the cedula of 1805, above cited.

4. The payment of taxes on this grant by claimants and their predecessors in title, upon which much stress was laid in the argument, is entirely irrelevant as a matter of estoppel or otherwise. The Arizona statute under which these taxes are paid is one taxing, not the fee, but the possession. (*Maish* v. *Arizona*, 164 U. S., 599.) Since claimants have enjoyed the possession of these properties for years, invoking the protection of the public officers and the courts in maintaining such possession, it would seem a matter of simple justice that they should have been required to assist in supporting the Territorial government in return for the enjoyment of its privileges and its protection.

5. Upon the lack of a record of this grant, as required by the Gadsden treaty—a subject more fully

discussed on pages 235–240 of the principal brief—the case of *Osio* v. *United States* (23 How., 273) is instructive. In that case, as here, there was an expediente in the archives, and there, as here, there was no *toma de razón* of the grant. In discussing this state of facts, the court says (p. 279):

> Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in the Department of California, when a short entry was made in a book kept for the purpose, specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case there is a certificate appearing at the bottom of the instrument to the effect that such an entry had been made, but it is wholly unsupported by proof of the existence of any *such record*. An attempt was made before the commissioners, or in the district court, to account for the absence of such record evidence by showing that a book of Spanish records of the description mentioned was consumed by fire at San Francisco in 1851; but the recollections of the witness called for the purpose are so indistinct, and his knowledge of the contents of the book so slight, that the evidence is not entitled to much weight. Jimeno, who signed the certificate, was not called, and in view of all the circumstances there does not appear to be any ground to conclude that any such record was ever made.

The facts of that case make it particularly applicable to the one at bar.

Respectfully submitted.

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WILLIAM H. POPE,
Special Assistant to the Attorney-General.

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